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TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

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BOWMAN DAIRY COMPANY, ET AL.,

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UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 10080

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

BOWMAN DAIRY COMPANY, ET AL.,
Defendants.

Appeal of:

WILLIS L. HOTCHKISS.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

USCA 2204 The Gunthorp-Warren Printing Co., Chicago—4-17-50—50

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Esquire, Marshal.

Thursday, January 5, 1950.

Court met pursuant to adjournment.

Present: Honorable John P. Barnes, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff*, *vs.* Bowman Dairy Company; American Processing and Sales Company; Beloit Dairy Company; The Borden Company; Capitol Dairy Company; Hunding Dairy Company; Meadowmoor Dairies, Inc.; Western United Dairy Co.; William R. Boruszak; Hyman I. Freed; H. H. Inglehart; Walter F. Kettell; O. N. Koenig; Francis H. Kullman, Jr.; S. D. McGuire; D. Cameron Peck; and O. O. Smaha, *Defendants.*	No. 48 CR 360.

Be It Remembered, that, on to-wit, the 30th day of July, 1948, the above-entitled action was commenced by the filing of the following Indictment in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

INDICTMENT.

The Grand Jury Charges:

I. The Defendants.

1. The following corporations are hereby indicted and made defendants herein. Each is engaged in the business of purchasing milk and in the processing and sale of fluid milk to wholesale customers and other purchasers in the Chicago area and its vicinity:

(a) Bowman Dairy Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Bowman."

(b) The Borden Company is a corporation organized and existing under the laws of the State of New Jersey with offices and principal place of business in New York, New York. It is hereinafter referred to as "Borden."

4 (c) Beloit Dairy Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Beloit."

(d) Capitol Dairy Company is a corporation organized and existing under the laws of the State of Illinois, with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Capitol."

(e) American Processing and Sales Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. Its name, prior to some time in 1943, was Hawthorn-Mellody Farms Dairy, Inc. It is hereinafter referred to as "Hawthorn."

(f) Hunding Dairy Company is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business in Chicago, Illinois. It is hereinafter referred to as "Hunding."

(g) Meadowmoor Dairies, Inc. is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Meadowmoor."

(h) Western United Dairy Co. is a corporation organized and existing under the laws of the State of Illinois with offices and principal place of business at Chicago, Illinois. It is hereinafter referred to as "Western United."

2. The following natural persons are hereby indicted and made defendants herein. Each is, or within the three years next preceding the date of this indictment has been, associated with or employed by a defendant corporation and holds, or within said three year period has held, the official title or position therewith shown below:

Name	*Address*	*Title*	*Corporation*
William R. Boruszak	1369 Hyde Park Blvd. Chicago, Illinois	Vice-President and Director	Western United
Hyman I. Freed	106 S. Menard Avenue, Chicago, Illinois	Chairman of the Board and Director	Capitol
H. H. Inglehart	103 Washington Blvd., Oak Park, Illinois	General Sales Manager and Director, Chicago Milk Division	Borden
Walter F. Kettel	908 S. Prospect Ave., Park Ridge, Illinois	Sales Manager, Central Wholesale Division	Bowman
O. N. Koenig	5700 N. Kimball Ave., Chicago, Illinois	Vice President and Director, Chicago Milk Division	Borden
Francis H. Kullman, Jr.	2723 Simpson Street Evanston, Illinois	Vice-President and Director	Bowman
S. D. McGuire	Drake Hotel, East Lake Shore Drive and North Michigan Ave., Chicago	President	Beloit
D. Cameron Peck	1233 Crain Street, Evanston, Illinois	Vice-President and Director	Bowman
O. O. Smaha	5550 Kenmore Avenue, Chicago, Illinois	Executive Vice-President and Director, Chicago Milk Division	Borden

3. Wherever in this indictment it is alleged that any corporate defendant did any act or thing, such allegation shall be deemed to mean that such act was performed by the officers, agents, or employees of said corporate defendant, including the natural persons named herein as defendants.

II. Definitions.

4. Wherever the words "fluid milk" are used in this indictment, they are meant to signify and include cow's milk produced for sale and used for consumption in fluid form as whole milk.

6 5. As used in this indictment, the word "distributor" is meant to signify a person, firm, or corporation engaged in the business of pasteurizing, bottling, and distributing fluid milk.

6. Wherever the word "vendor" is used, it shall mean a person, firm, or corporation engaged in the business of buying fluid milk from a distributor for resale, in whole or in part, to wholesale customers or others.

7. As used herein, the term "wholesale customers" means those customers for fluid milk who buy from a distributor or from a vendor of a distributor for resale to consumers and also means those public institutions named hereinafter in paragraphs 14 and 15 of this indictment.

8. Wherever the word "Chicago area" are used in this indictment, they are meant to signify and include the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

III. Interstate Commerce.

9. The Chicago area has a population in excess of 3,500,000 persons and is one of the largest milk markets in the United States. Approximately one-half billion quarts of fluid milk are distributed and sold annually in the Chicago area. The total annual value of sales of fluid milk in the Chicago area and its vicinity by defendant corporations during 1946 was about $80,000,000, of which about $55,000,000 represented sales to their wholesale customers. The great majority of such sales were made in the Chicago area.

10. The corporate defendants sell and distribute approximately 65 per cent of the fluid milk consumed in the Chicago area.

7 11. About 60 per cent of the fluid milk sold in the Chicago area is produced in the States of Wisconsin and Indiana. Most of the remainder is produced in Illinois. Six of the corporate defendants purchase milk from producers (operators of dairy farms) located in either Wisconsin or Indiana, or both, and ship said milk by over-the-road motor vehicles or railroads into the Chicago area for sale. Each of the other corporate defendants buys and sells milk which is produced in States other than Illinois and which has been shipped by others from said States

into the Chicago area for sale. Milk produced in Wisconsin and Indiana becomes intermingled, prior to its sale by a defendant corporation, with milk produced in Illinois.

12. Fluid milk is by its nature perishable. It cannot be stored and must reach the consumer within a short time after production. All sales to consumers within the City of Chicago must, by City Ordinance, be made within 84 hours after the milk is delivered by a producer to a receiving station. Receiving stations are located in the States of Wisconsin, Indiana, and Illinois. From day to day there is a continuous flow of fluid milk and cream from producers in States other than Illinois, through the plants of defendants, to their wholesale customers in the Chicago area and its vicinity.

13. The purchase and receipt of said fluid milk in States other than Illinois, its transportation into the State of Illinois, and its processing, sale, and distribution in the Chicago area has constituted, and does constitute, interstate trade and commerce in fluid milk and cream between States other than Illinois and the State of Illinois.

IV. The Conspiracy.

14. During a period of approximately seven years immediately preceding the return of this indictment, the defendants, and others unknown to this jury, have knowingly and continuously engaged in an unlawful con-
8 spiracy to allocate among themselves the wholesale fluid milk customers in the Chicago area and sales of fluid milk to the Municipal Tuberculosis Sanitarium, Chicago, Illinois, to Cook County Jail, Chicago, Illinois, to Cook County Juvenile Detention Home, Chicago, Illinois, to Cook County Hospital, Chicago, Illinois, to Cook County Oak Forest Infirmary, Blue Island, Illinois, to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital, Hines, Illinois, to the United States Navy for delivery at the Naval Hospital, Great Lakes, Illinois, for delivery at the Naval Training Station, Great Lakes, Illinois, for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois, and to the United States Army for delivery at Fort Sheridan, Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois; which conspiracy has been in restraint of the hereinbefore

described trade and commerce in fluid milk, in violation of Section 1 of the Act of Congress of July 2, 1890 (U. S. C. Title 15, § 1), commonly known as the Sherman Act.

15. The aforesaid conspiracy has consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer
9 was dissatisfied with his supplier of fluid milk;

(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales.

16. For the purpose of forming and effectuating the aforesaid conspiracy, the defendants, by agreement and concerted action, have done the things which, as hereinabove alleged, they conspired to do.

V. Effects of the Conspiracy.

17. The conspiracy, as alleged in this indictment, has had the effect, as intended by the defendants, of allocating among defendants the business of selling fluid milk to the said named wholesale customers and to other wholesale customers in the Chicago area, thereby enabling them to obtain higher prices for their wholesale sales of fluid milk than they otherwise would have been able to secure.

VI. Jurisdiction and Venue.

18. The conspiracy herein alleged has been entered into and carried out, in part, within the Northern District of Illinois, Eastern Division, within the City of Chicago, where each of the corporate defendants has offices and transacts business. During the period of said conspiracy, and within the applicable period of the statute of limitations, defendants performed, within the Northern

District of Illinois, Eastern Division, many of the acts and entered into many of the agreements hereinbefore alleged in paragraphs 14, 15, and 16 of this indictment.

Dated July 30, 1948.

A True Bill:
Jesse J. Qurollo,
Foreman.

Herbert A. Bergson,
Assistant Attorney General.

Geo. B. Haddock,
Special Assistant to the Attorney General.

Otto Kerner, Jr.,
United States Attorney.

Melville C. Williams,
Special Assistant to the Attorney General.

Paul V. Ford,
Harry H. Faris,
George E. Leonard,
Walter A. Bolinger,
Special Attorneys,
Suite 826, 208 South LaSalle Street,
Chicago 4, Illinois,
Central 6886.

12 And afterwards on, to wit, the 13th day of June, 1949, came the Defendants, American Processings and Sales Company, et al., by their Respective Attorneys, and filed in the Clerk's office of said Court their certain Respective Motions For A Subpoena In Accordance With Rule 17(c) Of The Federal Rules Of Criminal Procedure, in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION FOR A SUBPOENA IN ACCORDANCE WITH RULE 17 (c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes American Processing And Sales Company, Defendant, and requests this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendant or its attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans,
or furnishing refrigerators, to a wholesale customer of
14 another corporate defendant in order to cause such
customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defend-

ants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

15 "(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery

16 at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant," and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied wtih his supplier of fluid milk," and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage," in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises," and the name and address of each such customer.

Herman A. Fischer,
Carlton L. Fischer,
Attorneys for American Processing and Sales Company.

Of Counsel:
Campbell, Clithero and Fischer.

Received a copy of this motion this 13th day of June, 1949.

Melville C. Williams.

17 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—48-Cr.-360) • •

MOTION OF DEFENDANTS BELOIT DAIRY COMPANY AND S. D. McGUIRE FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come defendants Beloit Dairy Company and S. D. McGuire, and request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash,
18 loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

19 "(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about

20 April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defend-

ants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the al-
21 leged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Leo F. Tierney,
Donald M. Graham,
Attorneys for Beloit Dairy Company and S. D. McGuire.

Of Counsel:
Mayer, Meyer, Austrian & Platt.

22 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17 (c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come the Defendants, The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

23 A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

24 "(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes,

25 Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, re[illegible]rained "from offering inducements" "to a wholesale customer of another corporate defendant," and the name and address of each such customer.

D. Each instance when a "corporate defendant" "of-

fered to customers of competitors of corporate defendants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk," and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage," in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, 26 and the store fixtures had not been removed from the premises," and the name and address of each such customer.

The Borden Company,
H. H. Inglehart,
O. N. Koenig,
O. O. Smaha,
By Howard Neitzert,
Edwin Clark Davis,
Walter J. Cummings, Jr.
Joseph A. Greaves,
Their Attorneys.

Sidley, Austin, Burgess & Harper,
Of Counsel.

Received a copy of the aforesaid Motion this 13th day of June, A. D. 1949.

Otto Kerner, Jr.,
United States Attorney,
Per E. J. Ryan.
Melville C. Williams,
Special Assistant to the Attorney General.

27 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

MOTION OF THE DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come Defendants, Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck, and request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans,
28 or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook
29 County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

30 B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" " to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "of-

fered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Louis E. Hart,
L. Edward Hart, Jr.,
Leo F. Tierney,
Donald M. Graham,
Attorneys for Defendants, Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck.

Montgomery, Hart, Pritchard & Herriott,
Mayer, Meyer, Austrian & Platt,
Of Counsel.

31 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-Cr.-360) * *

MOTION OF THE DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Capitol Dairy Company and Hyman I. Freed, defendants, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection, by the defendants or their attorneys, of all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of
32 another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate
33 defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more that the lowest of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

34 C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered, and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant",

in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Isidore and Herbert B. Fried,
Attorneys for Capitol Dairy Company and Hyman I. Freed.

35 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION OF CERTAIN DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Hunding Dairy Company, Western United Dairy Company and William R. Boruszak, Defendants, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America other than by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another

corporate defendant in order to cause such customer
36 thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

37 "(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States

Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all
38 or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Thomas B. Gilmore,
Attorney for said Defendants.

39 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—48-Cr.-360) • •

MOTION OF THE DEFENDANT, MEADOWMOOR DAIRIES, INC., FOR A SUBPOENA IN ACCORDANCE WITH RULE 17 (c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes Meadowmoor Dairies, Inc., one of the defendants herein, and requests this Court for an order directing the United States Attorney, at a time and place therein to be specified, to produce and permit the inspection of by the Defendant or its attorneys all books, papers, documents or objects obtained by the United States Attorney other than by seizure or process from the Defendant or others upon which the United States Attorney intends to rely in the prosecution of this cause or are material to the proof of the issues of this cause for the preparation of the defense of each of the several Defendants herein above named.

Meadowmoor Dairies, Inc.,
By Charles W. Schaub,
Its Attorney.

Received a copy of the within Motion this 13th day of June 1949.

Melville C. Williams.

40 And on the same day to wit, the 13th day of June, 1949, came the Defendants, American Processing And Sales Company, et al., by their Respective Attorneys, and filed in the Clerk's office of said Court their certain Respective Motion For Discovery And Inspection In Accordance With Rule 16 of the Federal Rules Of Criminal Procedure in words and figures following, to wit:

41 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes, American Processing And Sales Company, Defendant, and requests this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendant or its attorneys, all books, papers, documents or objects obtained by the United States of America from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause

42 such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer,

would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook
43 County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois. and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

44 B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Herman A. Fischer,
Carlton L. Fischer,
Attorneys for American Processing and Sales Company.

Of Counsel:
Campbell, Clithero and Fischer.

Received a copy of this motion this 13th day of June, 1949.

Melville C. Williams.

45 IN THE UNITED STATES DISTRICT COURT.
(Caption—48-Cr.-360)

MOTION OF DEFENDANTS BELOIT DAIRY COMPANY AND S. D. McGUIRE FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come defendants Beloit Dairy Company and S. D. McGuire, and request this Court for an order directing the United States of America, at a time and place and in a manner therein to be specified, to permit them to inspect and take copies or photographs of all books, papers, documents or tangible objects obtained by process or seizure from the defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

46 "(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

47 "(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April

48 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defend-

ants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the al-
49 leged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Leo F. Tierney,
Donald M. Graham,
Attorneys for Beloit Dairy Company and S. D. McGuire.

Of Counsel:
Mayer, Meyer, Austrian & Platt.

50 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANTS FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come the Defendants, The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha, and jointly and severally request this Court for an order directing the United States of America, at a time and place thereon to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

51 A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of the defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendant other than Beloit would either not bid at all or would bid more than Beloit on sales

of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales
52 of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of those two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United
53 States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant" in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another

corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the al-
54 leged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

The Borden Company,
H. H. Inglehart,
O. N. Koenig,
O. O. Smaha,
By Howard Neitzert,
Edwin Clark Davis,
Walter J. Cummings, Jr.,
Joseph A. Greaves,
Their Attorneys.

Sidley, Austin, Burgess & Harper,
Of Counsel.

Received a copy of the aforesaid Motion this 13th day of June, A. D. 1949.
Otto Kerner, Jr.,
United States Attorney,
Per E. J. Ryan,
Ass't U. S. Att'y,

Melville C. Williams,
Special Assistant to the Attorney General.

55 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—48-Cr.-360)

MOTION OF THE DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come Defendants, Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck, and request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such
56 customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either

not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other cor-
57 porate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

58 C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "of-

fered to customers of competitors of corporate defendants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Louis E. Hart
L. Edward Hart, Jr.
Leo F. Tierney
Donald M. Graham
Attorneys for Defendants,
Bowman Dairy Company,
Walter F. Kettell,
Francis H. Kullman, Jr., and
D. Cameron Peck.

Montgomery, Hart, Pritchard & Herriott
Mayer, Meyer, Austrian & Platt
Of Counsel.

59 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANTS FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Capitol Dairy Company and Hyman I. Freed, defendants, and jointly and severally request this Court for an order directing the United States of America, at a time and place therein to be specified, to produce and permit the inspection, by the defendants or their attorneys, of all books, papers, documents or objects obtained by the United States of America from or belonging to the defendants or obtained from the non-defendant milk distributors, and others by seizure or by process, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of
60 another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk.

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

"(g) That Bowman and Capitol would alternately
61 bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all
62 or would bid more than the lowest bid of these two on such sales."

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant", and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defend-

ants" "such inducements". In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant", in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk", and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage", in furtherance of the alleged conspiracy, of a customer whom such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises", and the name and address of each such customer.

Isidore and Herbert B. Fried,
Attorneys for Capitol Dairy Company and Hyman I. Freed.

63 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION OF CERTAIN DEFENDANTS FOR A SUBPOENA IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now come, Hunding Dairy Company, Western United Dairy Company and William R. Boruszak, Defendants, and jointly and severally request this Court for an order directing the United States of America at a time and place therein to be specified, to produce and permit the inspection of, by the Defendants or their attorneys, all books, papers, documents or objects obtained by the United States of America by seizure or process from the Defendants, non-defendant milk distributors, and others, and relating to the period covered by the indictment, which tend to sustain the charges of:

A. An agreement or understanding:

"(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or

furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offer-
64 ing the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose;

"(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

"(c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

"(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

"(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sales of fluid milk to Cook County Jail, Chicago, Illinois;

"(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois.

65 "(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

"(h) That defendants other than Capitol would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Oak Forest Infirmary, Blue Island, Illinois;

"(i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

"(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

66

B. Acts in furtherance of the alleged conspiracy.

C. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, refrained "from offering inducements" "to a wholesale customer of another corporate defendant," and the name and address of each such customer.

D. Each instance when a "corporate defendant" "offered to customers of competitors of corporate defendants" "such inducements." In each instance listed, what inducement was offered and when, by whom, and to whom was such inducement offered.

E. Each instance in which "a corporate defendant," in furtherance of the alleged conspiracy, did "not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk," and the name and address of each such customer whom a corporate defendant so refrained from soliciting.

F. Each instance when a defendant failed to "attempt to secure the patronage," in furtherance of the alleged conspiracy, of a customer when such "store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises," and the name and address of each such customer.

Thomas B. Gilmore,
Attorney for said Defendants.

67 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-Cr.-360) * *

MOTION OF DEFENDANT, MEADOWMOOR DAIRIES, INC., FOR DISCOVERY AND INSPECTION IN ACCORDANCE WITH RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Now comes Meadowmoor Dairies, Inc., one of the defendants herein, and requests this Court for an order directing the United States of America, at a time and place and in a manner therein to be specified, to permit the Defendant to inspect and take copies or photographs of all books, papers, documents, or tangible objects obtained by process or seizure belonging to the Defendant or others, dated and compiled during the period covered by the indictment, which demonstrate:

A. "(a) That each corporate defendant would refrain from offering inducements such as payments of cash, loans, or furnishing refrigerators, to a wholesale customer of another corporate defendant in order to cause such customer thereafter to purchase fluid milk from the defendant offering the inducement, although such inducements were then being offered to customers of competitors of corporate defendants for said purpose:

(b) That a corporate defendant would not solicit a wholesale customer of another defendant to obtain his patronage for fluid milk except where the customer was dissatisfied with his supplier of fluid milk;

68 (c) That when a store or restaurant wholesale customer ceased doing business and reopened within 30 days, under either new or old management, and the store fixtures had not been removed from the premises, none of defendants, except the one formerly selling to the customer, would attempt to secure the patronage of said customer;

(d) That corporate defendants other than Beloit would either not bid at all or would bid more than Beloit on sales of fluid milk for the Municipal Tuberculosis Sanitarium, Chicago, Illinois;

(e) That defendants other than Bowman would either not bid at all or would bid more than Bowman on sale of fluid milk to Cook County Jail, Chicago, Illinois;

(f) That defendants other than Western United would either not bid at all or would bid more than Western United on sales of fluid milk to Cook County Juvenile Detention Home, Chicago, Illinois;

(g) That Bowman and Capitol would alternately bid more than the other on sales of fluid milk to Cook County Hospital, Chicago, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales;

(h) That defendants other than Capital would either not bid at all or would bid more than Capitol on sales of fluid milk to Cook County Forest Infirmary, Blue Island, Illinois;

69 (i) That defendants other than Borden would either not bid at all or would bid more than Borden on sales of fluid milk to United States Marine Hospital, Chicago, Illinois, to United States Veterans' Administration Hospital (until about April 1, 1946), Hines, Illinois, and to the United States Navy for delivery at the Naval Training School, Navy Pier, Chicago, Illinois, and for delivery at the Naval Training School, Naval Reserve Armory, Chicago, Illinois;

(j) That Bowman and Borden would alternately bid more than the other on sales of fluid milk to United States Veterans' Administration Hospital (after about April 1, 1946), Hines, Illinois, to the United States Navy for delivery at the Naval Training Station, Great Lakes, Illinois, and for delivery at the Naval Hospital, Great Lakes, Illinois, and on such sales to the United States Army for delivery at Fort Sheridan, Illinois, and for delivery at Vaughan General Hospital, Hines, Illinois, and that the other corporate defendants would either not bid at all or would bid more than the lowest bid of these two on such sales."

B. Or acts in furtherance of the alleged terms of the conspiracy.

Meadowmoor Dairies, Inc.,
By Charles W. Schaub,
Its Attorney.

Received a copy of the within Motion this 13th day of June 1949.

Melville C. Williams.

70 And afterwards, to wit, on the 24th day of October, 1949, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

71 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

This cause coming on for hearing on the defendants' motions for bill of particulars, discovery, subpoena and to strike surplusage come the parties by their attorneys respectively and the Court having heard the arguments of counsel and being fully advised in the premises decides the defendants' motions for discovery under Rule 16 and for a subpoena under Rule 17c of the Federal Rules of Criminal Procedure, orally from the bench and it is

Ordered that counsel be and is hereby directed to prepare and present within a short date and upon notice a draft order consistent with the views expressed and it is

Further Ordered that the defendants' motions to strike surplusage and for bill of particulars be taken on briefs and arguments.

72 And afterwards on, to wit, the 1st day of November, 1949 there was filed in the Clerk's office of said Court a certain Subpoena Duces Tecum With Affidavit Of Service, Attached Thereto, in words and figures following, to wit:

73 SUBPOENA DUCES TECUM.

(Case No. 48 Cr. 360)

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

Northern District of Illinois.

The President of the United States of America.

To Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, U. S. Court House, Chicago, Illinois, and Willis Hotchkiss, Esq., Special Assistant to the Attorney General, Suite 826, 208 S. LaSalle Street, Chicago, Illinois,—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for said District, at a time and place to be specified in an order of said Court, in a certain cause now pending and undetermined in said Court, wherein United States of America is Plaintiff and Bowman Dairy Company, *et al.*, are Defendants, on the part of the defendants And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under

said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants, and paper writings what soever, that can or may afford any information or evidence in said cause. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

Witness, the Honorable John P. Barnes, Judge of the said Court, at Chicago, in said District, this 1st day of November, in the year of our Lord one thousand nine hundred and 49, and of the Independence of the United States of America the 174th year.

Roy H. Johnson,
Clerk.

(Seal Copy)

Endorsed: District Court of the United States. * * (Caption—48-Cr.-360) * * Subpoena Duces Tecum.

Montgomery, Hart, Pritchard & Herriott,
120 S. LaSalle St., Chgo., Ill.,

Mayer, Meyer, Austrian & Platt,
231 S. LaSalle St., Chgo., Ill.,

Sidley, Austin, Burgess & Harper,
11 S. LaSalle St., Chgo., Ill.,

Campbell, Clithero & Fischer,
1 N. LaSalle St., Chgo., Ill.,

Isidore and Herbert B. Fried,
111 W. Monroe St., Chgo., Ill.,

Packard, Barnes, Schumacher, Gilmore & Van Ness,
38 S. Dearborn, Chgo., Ill.,

Charles W. Schaub,
120 S. LaSalle St., Chgo., Ill.,
Attorneys for Defendants.

74 UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

AFFIDAVIT OF SERVICE OF SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Charles F. Simon, being duly sworn, deposes and says: I am over the age of twenty-one years and reside at 2209 Ridge Avenue, Evanston, Illinois. On the 1st day of November, 1949, at 208 South La Salle Street, Chicago, Illinois, I served the annexed subpoena duces tecum on Willis L. Hotchkiss, United States Attorney, by exhibiting to him the original subpoena and delivering to and leaving personally with him a true copy thereof, and at the same time tendered to him the sum of Four Dollars and Fourteen Cents ($4.14), the fee required by law for attendance at Court as witness in the above entitled proceeding. The aforementioned witness fee was refused by the said Willis L. Hotchkiss. At the time of such service I knew the said Willis L. Hotchkiss to be the individual mentioned and described in said subpoena duces tecum.

Charles F. Simon.

Subscribed and sworn to before me this 1st day of November, 1949.

Kathryn M. Reilly,
(Seal) *Notary Public.*

My Commission Expires March 23, 1953.

75 And afterwards, to wit, on the 2nd day of November, 1949, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

76 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

On stipulation of the parties herein it is Ordered that the defendants' motions to settle orders in connection with defendants' motions under Rule 16 and Rule 17 C of the Federal Rules of Criminal Procedure be and the same are hereby set for hearing on November 7, 1949 at 10 o'clock A. M.

77 And afterwards on, to wit, the 7th day of December, 1949 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On November 7, 1949, Before Honorable John P. Barnes, Judge in words and figures following, to wit:

78 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360-1-2) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on Monday, November 7, 1949, at 10:00 o'clock a. m.

Present:

79 Willard Hotchkiss, Esq., Special Assistant to the Attorney General, and other counsel, appearing on behalf of the Government;

L. Edward Hart, Jr., Esq., Leo F. Tierney, Esq., Donald M. Braham, Esq., and other counsel, appearing on behalf of defendants Bowman Dairy Company, et al.;

Howard Neitzert, Esq., Walter J. Cummings, Jr., Esq., and other counsel, appearing on behalf of defendants The Borden Company, et al.

And thereupon the following proceedings were had herein:—

By the Clerk: No. 48 Cr. 360. United States of America *vs.* Bowman Dairy Company, et al.

No. 48 Cr. 361. United States of America *vs.* Bowman Dairy Company, et al., and

No. 48 Cr. 362. United States of America *vs.* The Borden Company, et al.

By the Court: How much time do you think these cases will take?

By Mr. Hotchkiss: I would say they would either take two minutes, or they would take perhaps an hour, depending upon the desires of the Court.

By Mr. Cummings: Our part will only take a few minutes.

80 By the Court: Very well. I will hear you as soon as I dispose of my motions.

(And thereupon the Court gave attention to other matters upon the call, after which the following further proceedings were had herein:—)

By the Clerk: No. 48 Cr. 360. United States of America *vs.* Bowman Dairy Company, et al.

No. 48 Cr. 361. United States of America *vs.* Bowman Dairy Company, et al., and

No. 48 Cr. 362. United States of Amrecia *vs.* The Borden Company, et al.

By the Court: Proceed.

By Mr. Hart: If the Court please, we have settled the orders in all three cases, under our motions under Rule 16. The general form is that they show to us, or exhibit to us the documents listed in all the subpoenas duces tecum issued in connection with the milk investigation by the Grand Jury.

We have served a subpoena on the attorneys for the Government in 48 Cr. 360 under Rule 17(c).

We have endeavored to follow the rule in that subpoena, excepting from its demands certain documents of the type which your Honor stated you were unwilling to require
81 the Government to make available to us. Without presenting their objections to the exceptions as we have worded it in the subpoena, the Government has taken the position that they are not subject to Rule 17(c).

By the Court: Let's see Rule 17. (Booklet handed to the Court.)

Why not? I don't think the Government is something that is separate and apart. That doesn't appeal to me. And I haven't much patience with it. After all, when the Government comes into this court or any other court it is just a party litigant, just like any other party litigant.

In my opinion generally speaking I can't see any reason why that should not apply to the Government; and I don't care what anybody says about it except some court that can tell me what it means. If the Circuit Court of Appeals or the Supreme Court of the United States holds differently, why then I will have to follow that, and not until they do—the Government is just like any other litigant.

By Mr. Ho hkiss: Your Honor, in this proceeding counsel for the defense, as I pointed out to the Court before, in connection with the negotiations on the settlement of the

orders for the production of documents—and the Gov-
82 ernment leaned over backwards with respect to permitting, with respect to agreeing to the form of an order under Rule 16 which as the Court knows applies to these documents which the Government secured under process or seizure. Now, as to that order the Government agreed to a form of order which permitted the defendants here to secure access to every single document which was produced under grand jury subpoena.

Now, number two—

By the Court: The Government in that connection is just like the court under a similar situation. You are not to be commended for doing your duty.

By Mr. Hotchkiss: Now, on the question of the documents which were not secured by the Government in response to process or in response to subpoena, but which the Government secured voluntarily from volunteers or confidential informants or others not under subpoena, the Government offered as to those documents to enter into a stipulation with the defendants, giving them full access to those documents, reserving of course the privileged documents from those which would be turned over to the defendants.

Now, this is the position of the Government—and I ask the Court to bear with me for just a few minutes.

83 It is the position of the Government that the legislative history of Rule 17—

By the Court: Well, now, I have had occasion to talk about legislative history before. But there is nothing uncertain about (c), is there? Look at it?

By Mr. Hotchkiss: Yes, sir, I contend that there is nothing uncertain about (c) because the phraseology of the rule—Rule 17(c) does not apply to the Government or to the Government's attorneys, and was never intended to apply.

By the Court: Where do you see that language?

By Mr. Hotchkiss: Because in every instance in the criminal rules in which it was intended that the rules apply to the Government or to an attorney for the Government, the rules specifically spell it out that the rule does apply to the Government or to an attorney for the Government.

Now, this Rule 17(c) does not spell it out.

By the Court: Now, you have just strong-armed that, because I think 17(c) does apply to the Government.

By Mr. Hotchkiss: All right. Take 17(c) again, and look at the last sentence in 17(c).

By the Court: Listen! I will be glad to have you
84 take that question up. And if you want to spend the next two or three years following up that question instead of trying these defendants it is all right with me.

Now, you are going to give them that material or I will issue a subpoena to that effect. And you can just disobey it, and spend the next two or three years fighting that question out. It is a very interesting question—take a good deal of time, take a good many young men to investigate it, take probably two or three years to decide it.

By Mr. Hotchkiss: Your Honor, I believe—

By the Court: Now we will do that.

By Mr. Hotchkiss: Very well.

By the Court: And I think it applies to the United States. And I don't like this idea that the Government stands aside and is above any other kind of a litigant. I don't think that is the way we ought to act in a republic.

By Mr. Hotchkiss: Of course, I wish to point out—

By the Court: I am against you.

By Mr. Hotchkiss: Very well.

By the Court: I don't see any reason for exempting the Government. I am not going to do it. I am very glad to have it tested out.

85 By Mr. Hotchkiss: Very well.

The Government has offered voluntarily to let the documents be made available, but if the Court feels that subpoenas should issue—

By the Court: I am not insisting, but if you want to decide that very nice question of law, it is up to you to just spend the next two or three years getting it decided.

By Mr. Hotchkiss: Your Honor, I would respectfully suggest that the Court hear what the Government has to say.

By the Court: Now you are going to talk to me about that Senator so and so said this, and so on.

By Mr. Hotchkiss: I merely want to refer to what is in there.

By the Court: You point out to me in (c) any exception as to the Government. It is not there.

By Mr. Hotchkiss: I have said on the basis of the rules that they spell out the exception.

By the Court: I am against you.

By Mr. Hotchkiss: May I point out the last sentence of (c)?

By the Court: I am against you because, first, no rule or statute should be so written so as to treat the Government in that way. Second, it has not been so written.

86 If you want a decision, you just stand on it and I will issue a subpoena, and you can disobey it. There is a very nice question. I don't know how many young men you could put on that for the next year. The Supreme Court will have to decide it. That is what I will do.

By Mr. Hotchkiss: In other words, the Court does not wish to hear further argument from me?

By the Court: No I don't.

By Mr. Hotchkiss: Very well.

By the Court: I don't like that attitude on the part of the Government that they stand on a different basis than any other litigant. I don't like it. It is wrong.

By Mr. Hotchkiss: The Government simply takes the position that if the Congress had intended the terms of this rule to apply to the Government and to the Government attorneys it wouldn't have done what it did.

By the Court: I am against you.

By Mr. Hotchkiss: Because of the language in similar situations, an almost identical situation.

By the Court: The question is decided. I will be very glad indeed to have you take it up.

87 By Mr. Hotchkiss: Very well.

By Mr. Hart: If the Court please, a subpoena has been served and is attached to the order we have submitted under Rule 17(c). It contains in a parenthetical clause in the second, third and fourth lines the exceptions as closely as we could draft it to the documents your Honor said we could not see. I think we have covered everything your Honor mentioned in his discussion.

And other than that the subpoena calls for the production of documents that are volunteered, except as it is worded, Memoranda prepared by Government counsel and documents or papers solicited by or volunteered to Government counsel, which consist of narrative statements of persons or memoranda of interviews.

88 By the Court: All right. Do you know what you want to do now?

By Mr. Hotchkiss: Yes.

By the Court: What do you want to do?

By Mr. Hotchkiss: Your Honor, the Government isn't

going to quibble at this time with respect to the papers in this subpoena. In other words—

By the Court: I understood you to say that you were willing to give them all of that material, and you didn't need a subpoena issued. Is that it?

By Mr. Hotchkiss: The Government had offered to the defendants in writing to give them the material without the issuance of a subpoena.

By the Court: Well, what is the stipulation?

I am not anxious to hold anybody, if they will give you everything you want. But if counsel for the Government wants to have a decision by a court other than this on the question of whether a subpoena will lie in this case I will give them an opportunity to do that. I don't insist.

By Mr. Hotchkiss: Here is what I wrote to the defendants:

"In furtherance of the understanding we reached in court on the subject of the non-process documents"—

89 Not coming under Rule 16,

"the Government is ready to enter into a stipulation with the defendants in the 360 case"

The Sherman Act case,

"that it will make available for inspection etc. by the defendants all documents of evidentiary character (excepting privileged documents)."

Those are the documents that the Court ruled that the Government doesn't have to turn over to the defendants, work product of the Government or similar material,

"which the Government now holds and which it obtained in connection with the investigation relating to these cases and which the Government obtained without any service of process."

Now, I think that is the broadest possible kind of a stipulation. In other words, if the defendants want to see the documents, very well, the Government is willing to let them see them under this stipulation.

By the Court: What order do you want? What is wrong with that?

By Mr. Hart: The qualification to that is that the
90 documents be evidentiary in character, and it is going to be up to the Government attorneys to determine.

By Mr. Hotchkiss: But, your Honor—

By the Court: If they offer papers which they have had in their possession and they haven't been made available to you they won't go in.

By Mr. Hart: I appreciate that. But not only do we want to get a look at those documents, but other documents which me might feel might be evidentiary in character to use at the trial.

By Mr. Hotchkiss: Oh, the Government intends to give the defendants everything that will be favorable to them as well as anything that may be favorable to the Government. By the use of the term "evidentiary" the Government was simply in this letter attempting to express what the Government felt was this court's intention as expressed in the hearings which we had.

By the Court: I don't know how you can go beyond this in a writ.

By Mr. Hotchkiss: Even this proposal here doesn't go beyond that, because obviously he cannot call for anything which is not evidentiary, or which could not be used somehow or other as evidence.

91 By the Court: What I mean is if you get that by stipulation I don't see how you could go beyond it in a writ. And I think apparently the Government is offering by stipulation all that I can give you by writ.

By Mr. Hart: I think they are coming close to it, if the Court please.

By the Court: What else?

By Mr. Hart: But I don't think they are going quite far enough.

By the Court: How would you modify it?

By Mr. Hart: I think the exception that we have inserted in that subpoena.

By the Court: What is that?

By Mr. Hart: Which excepts certain types of documents.

By Mr. Hotchkiss: As I say, your Honor, as far as the stipulation is concerned, while we might have some question as to purely matters of form—

By the Court: Look at it and see if there is any difference.

By Mr. Hart: You have a copy of it.

By Mr. Hotchkiss: Now your Honor I think there is just one rather minor point.

By the Court: What page is it on?

92 By Mr. Hart: It is attached as an exhibit at the back of that order, if the Court please. Those are the orders under 16; the 17(c) is the last order you have.

By the Court: What is it?

By Mr. Hotchkiss: There is only one objection—basic objection which I would make to the form which is proposed: This language in this subpoena or proposed subpoena, as I construe it does not protect those confidential informants who have provided the Government with confidential material which the Government feels on the basis of very well established principles followed by the courts are normally protected from the view of litigants.

By the Court: Where would you put it in?

By Mr. Hotchkiss: I would put it after the "except" in the parenthetical material, "except memoranda prepared by Government counsel".

By the Court: Wait a minute.

By Mr. Hotchkiss: That is obviously—

By the Court: I want that. Where is that paper now?

By Mr. Hotchkiss: It is in this subpoena.

By Mr. Hart: It is in the parenthetical clause, if the Court please.

93 By the Court: Except what?

By Mr. Hotchkiss: It speaks of documents, and so on (except memoranda prepared by Government counsel); that is work product of the Government.

"and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews."

Now, I don't think that that "except" material set forth in the parenthetical clause of the subpoena protects the situation.

By the Court: What would you add to it?

By Mr. Hotchkiss: "and documents furnished the Government without process or seizure by voluntary informants."

For example, let me give just an illustration of the type of situation I feel that the Court should be cognizant of. Taking purely a hypothetical situation, suppose an employe of one of these defendant companies should have come to the Government and have said, "Now I have in my possession certain documents bearing on the charges which the Government has made. I understand that you haven't secured these documents under the subpoenas, and I would like to turn them over to you so as to further the in-

94 terests of justice and to provide the Government with necessary evidentiary material regarding the charges made in the indictments."

And the Government says, "Yes, thank you, sir, we are glad to have these."

And the informant says, "Now, I want to keep out of this, you understand, because if it became known that I turned this documentary material over to you, you know what would happen to me, I would lose my job."

And the Government says, "Well, yes, we will do everything we can to protect you so that you won't lose your job, and the fact that you did give this information as a confidential informant will not come to the attention of the defendants."

I use that purely hypothetical illustration to show the type of protection that I think public policy demands be afforded to the documentary material which has been supplied to the Government by confidential informants.

By Mr. Hart: The difficulty there is, if the Court please, that Mr. Hotchkiss wants not only to keep from us the name of the informant—which we don't want, but the documents which he has brought in, which he says are evi-
95 dentiary. And that is the general tone of the letter and the discussion the Government has had with us. So that we feel that under 17(c) that we are entitled to that type of material that is volunteered.

If he writes a letter or something in which he transmits the documents, that is a factual situation, and that we have agreed to except, and we don't want it. But if he brings in certain lists or whatever they may happen to consist of and volunteers them to the Government, we want them, and we feel that we are entitled to them.

By Mr. Neitzert: Government counsel's illustration would be more appropriate I think if he had said that a large volume of the documents were obtained from a competitor of these defendants. And what we want is to see those documents that the Government obtained not under process, but voluntarily furnished by these informants, who are not, your Honor, people who are going to lose their jobs!

By Mr. Hotchkiss: As to these documents referred to, the overwhelming bulk of these documents in so far as I know, all of them were secured in response to subpoenas duces tecum issued by the Grand Jury. And those documents are available to the defendants under the pro-
96 posed order which will be submitted to the court with respect to Rule 16.

However, I should point this out—or, let us assume a

hypothetical situation; and let us assume further it may be an actual situation, that some competitor of these defendants came to the Government and said, "Look, I have some confidential material that will help you in your case, but I don't want to get mixed up in this, I don't want to have it mentioned that I am providing you with information, because I am afraid of my economic existence if such fact becomes known."

Now, I submit, your Honor, that public policy demands that that competitor be afforded the protection of this court in the interests of justice.

By Mr. Neitzert: Are you referring possibly to unlawful reprisals?

By Mr. Hotchkiss: I am referring to any kind of reprisal that may be instituted.

By Mr. Neitzert: I don't think it is any of the Government's job to protect competitors of these defendants.

By Mr. Tierney: If I may make a remark here, I feel that we are entitled to look at these documents as a matter of right under 17(c), and that neither this court or
97 these defendants should be permitted only to look at them because the Government after they have resisted this motion of ours now say, "In order to avoid the ruling by this court we will show you these but we want the court to enter an order to protect this and to protect that before looking at these documents."

I think that 17(c) gives your Honor power to enter the order. And so far as my office is concerned we don't care for a stipulated order. I would like to see an order of the court and as explicit as possible.

By Mr. Hart: The question as to whether that applied to the Government came up in the case of the United States *vs.* Bondi, Second Circuit Court of Appeals. And in that case the court ruled that 17(c) did apply to the Government. So that this is not an initial ruling on the subject at all.

Now, if there is difficulty as to the exception and if it should be changed we will be very glad to change it in accordance with your Honor's ideas on the subject.

We think that it covers everything of the type that Mr. Hotchkiss has been talking about except about his "evi-
dentiary material" which is "brought in voluntarily".
98 Now that we contend under that rule we should be able to view.

By the Court: I have studied this statement here in this proposed subpoena and I don't see much wrong with it.

By Mr. Hotchkiss: Well, I agree with that except for this possibility that the subpoena might pull in those documents which it seems to me are privileged and which it seems to me that the Court in its colloquy of October 24th regarded also as being privileged.

I don't have any particular objection to this particular form if it is in the stipulated order.

I might say further, your Honor, that in a sense we are discussing a moot situation, because I don't believe—

By Mr. Cummings: It has been decided in the Second Circuit.

By Mr. Hart: That is the United States *vs.* Bondi case, your Honor.

By the Court: Such memoranda as prepared by Government counsel, documents or papers.

By Mr. Hart: Solicited by or volunteered.

By Mr. Hotchkiss: Or memoranda of interviews.

By the Court: Or memoranda of interviews.

99 By Mr. Hotchkiss: Suppose that in addition to the Government having received a narrative statement from some person regarding certain aspects of the indictments in these cases and this informant had provided a narrative statement, and clipped to that narrative statement was some documentary material which he volunteered. And in his narrative statement he says, "This is given to you in confidence". What have you got?

By the Court: I know, but there isn't any such thing, there isn't any such thing.

By Mr. Hotchkiss: You mean there isn't any such thing here?

By the Court: Yes, confidence from a court to find out what the facts are.

By Mr. Hotchkiss: I appreciate that the court may order such documents produced. But I submit that historically the courts have always as a matter of public policy protected informants and protected the information secured from informants.

Normally the bulk of the Government's material—evidentiary material is secured through grand jury process on grand jury subpoenas that were issued.

Here in this case dozens of grand jury subpoenas
100 were issued directed to scores of firms, and an enormous amount of documentary material has been se-

cured. The Government has interposed no objection to letting them have all of that.

By the Court: Well, we have had quite a broad experience with the new civil rules, and they have been a great step forward in the handling of litigation, and they have brought progress. And we have used them to require the litigants to show their facts on the table to speed up and bring an end to litigation. There isn't any doubt about it. And I don't see why it can't be applied to criminal cases, that instead of taking six months to try a case it really ought to be tried in two or three weeks if we can do it.

I know how offensive an idea it is to a lawyer to make him show his case, that it is much like plunging a dagger into his heart. But the judge takes a somewhat different view of it to the end of getting through with the litigation and doing justice between the parties. And he is not particularly tender about John Jones being offended because somebody finds out that he is a tale bearer. Men have been tale bearers since the beginning of the world, and they will continue to be. And they are usually found out any-

101 how.

I don't see anything wrong with this statement. I will be glad to have you agree on it. On the other hand, I will be very glad to have you go up if the Government wants to go up.

By Mr. Hotchkiss: I might point out that the Government all the way through this proceeding has indicated that as far as Rule 16 is concerned we are very happy to let them have this material.

By the Court: I know that. But I won't give you any credit for that. I am not going to give you any credit for doing your duty.

By Mr. Hotchkiss: On this form the Government did not and never has been in this proceeding challenging it.

By the Court: No, all I want to know, do you want to give them these papers as enumerated in this part of the subpoena or do you want me to make that order? Now, which is it?

By Mr. Hotchkiss: Your Honor, as far as the documents in the possession of the Government at the present time, the Government stands willing now as it has stood willing prior to this time to enter into a stipulation with the defendants embodying those terms, if you please.

102 By the Court: Very well.

By Mr. Hotchkiss: Except the defendants have in-

sisted, I understand, that they want a subpoena. Now, if they want a subpoena and insist upon a subpoena embodying these terms, very well.

By the Court: What do you want?

By Mr. Hart: We have already served a subpoena, that is true, if the Court please, which in the orderly course of business we have to do.

The order merely directs how that subpoena shall be complied with and at what time and place.

By Mr. Cummings: The same proceeding followed by Judge Bondi in that case.

By Mr. Hart: The subpoena there was served and then an order submitted to the court which he signed later on directing the method of compliance.

By Mr. Hotchkiss: I might point out that this is not a matter that—I haven't called it to counsel's attention, but Judge Niven within the last two weeks in the Southern District of Ohio has refused to issue a subpoena under Rule 17.

By Mr. Hart: That is not entirely true, if the Court please. He refused to issue a subpoena under a motion

By the Court: Really, you know we District Judges 103 are not infallible, and we all make mistakes. And I make my share, and most of the other Judges make their share.

I think the parties are entitled to this material. I don't care what anybody else thinks except the Circuit Court of Appeals of the Seventh Circuit or the Supreme Court of the United States.

Now, what date in November? Would anybody make a suggestion?

By Mr. Hart: That is entirely at the convenience of the Government. We will start any time they are ready.

By the Court: Do you want to participate in this matter to the extent of making suggestions as to the date in November that is agreeable?

By Mr. Hotchkiss: Oh, say November 15th. And we will advise defense counsel if we cannot meet that date.

By Mr. Hart: That is all right. No difficulty about that.

By Mr. Hotchkiss: That is purely a formal matter.

By Mr. Hart: If the Court please, I suggest that the same date be entered in the other three orders, which are agreeable to the Government. And we will be glad to cooperate with them in making any extension of that if they find it is inconvenient.

105 And to wit, on the 7th day of November, 1949, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following two entries, to wit:

106 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This cause coming on to be heard on defendants' motions to require the attorneys for the Government to permit defendants to inspect and copy or photograph certain books, papers, documents and objects under Rule 16 of the Federal Rules of Criminal Procedure and the Court being fully advised,

It Is Ordered that the attorneys for the Government are directed to permit defendants or their attorneys or agents to inspect and copy or photograph (at the office of the Department of Justice, Antitrust Division, located at 208 South La Salle Street, Chicago, Illinois), all books, papers, documents or tangible objects which are now in the custody of the Government and which were received by it in response to the several grand jury subpoenas duces tecum listed on Exhibit A hereto attached, which is by reference made a part hereof. Such inspection, copying, and photographing shall be permitted to begin on November 15th, 1949, and continue from time to time thereafter during usual office hours until such inspection and copying, or

107 photographing shall with reasonable dispatch be completed. Government attorneys shall make available reasonable accommodations for such inspection and copying or photographing, and

It Is Further Ordered that except as hereinabove provided, the defendants' motions for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure be and the same are hereby denied.

John P. Barnes,
United States District Judge.

Dated: November 7th, 1949.

108 EXHIBIT A.

Subpoena Duces Tecum

		Date Issued	Returnable
1.	Belmont Dairy Company 221 North La Salle Street Chicago 1, Illinois	9/17/47	10/3/47
2.	Hawthorne-Mellody Farms Dairy, Inc. 4224 West Chicago Avenue Chicago 51, Illinois	9/17/47	10/3/47
3.	Hawthorne-Mellody Farms Dairy, Inc. 4224 West Chicago Avenue Chicago 51, Illinois	7/9/48	7/22/48
4.	Hawthorne-Mellody Farms Dairy, Inc. 4224 West Chicago Avenue Chicago 51, Illinois	5/6/48	5/19/48
5.	C. J. Wieland & Son, Inc. 4942 West Lawrence Avenue Chicago 30, Illinois	9/17/47	10/3/47
6.	American Processing & Sales Company 4224 West Chicago Avenue Chicago 51, Illinois	5/6/48	5/19/48
7.	Ridgeview Farm Dairy, Inc. 923 North Wolcott Avenue Chicago 22, Illinois	5/6/48	5/19/48
8.	National Tea Company 1000 Crosby Street Chicago, Illinos	7/9/48	7/22/48
9.	The Congress Hotel (Alfred L. Nielsen) 520 South Michigan Boulevard Chicago, Illinois	7/19/48	7/26/48
10.	Ogden Dairy Company 4333 Ogden Avenue Chicago, Illinois	5/6/48	5/19/48
11.	Belmont Dairy Company 1636 North Honore Chicago, Illinois	5/6/48	5/19/48

		Date Issued	Returnable
12.	Lake Valley Farm Products, Inc. 5330 South Western Avenue Chicago 9, Illinois	5/6/48	5/19/48
13.	Lake Zurich Milk Company 210 West Chestnut Street Chicago 10, Illinois	5/6/48	5/19/48
109 14.	Lakeview Dairy Company 5332 South Western Avenue Chicago 9, Illinois	5/6/48	5/19/48
15.	Western United Dairy Company 1441 West Edgemont Avenue Chicago, Illinois	5/6/48	5/19/48
16.	International Dairy Company 1910 South Ashland Avenue Chicago, Illinois	5/6/48	5/19/48
17.	Capitol Dairy Company 4326 South Wabash Avenue Chicago, Illinois	5/6/48	5/19/48
18.	Hunding Dairy Company 1300 East 71st Street Chicago, Illinois	5/6/48	5/19/48
19.	Meadowmoor Dairies, Inc. 1334 South Peoria Street Chicago, Illinois	5/6/48	5/17/48
20.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	1/16/48	2/16/48
21.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/2/47	12/5/47
22.	The Borden Company 3638 North Broadway Chicago, Illinois	12/9/47	12/12/47
23.	Peat Marwick Mitchell & Company 105 South La Salle Street Chicago, Illinois	11/24/47	11/26/47
24.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	9/17/47	10/2/47
25.	Beloit Dairy Company 210 West Chestnut Street Chicago, Illinois	9/17/47	10/3/47

		Date Issued	Returnable
26.	Capitol Dairy Company 4326 South Wabash Avenue Chicago, Illinois	9/17/47	10/2/47
27.	Hunding Dairy Company 1300 East 71st Street Chicago, Illinois	9/17/47	10/2/47
110 28.	International Dairy Company 1912 South Ashland Avenue Chicago, Illinois	9/17/47	10/2/47
29.	Meadowmoor Dairies, Inc. 1334 South Peoria Chicago, Illinois	9/17/47	10/3/47
30.	Ogden Dairy Company 4333 Ogden Avenue Chicago 23, Illinois	9/17/47	10/3/47
31.	Ridgeview Farms Dairy, Inc. 923 North Wolcott Avenue Chicago 22, Illinois	9/17/47	10/3/47
32.	Western United Dairy Company 1441 West Edgemont Avenue Chicago 7, Illinois	9/17/47	10/2/47
33.	The Borden Company 3638 North Broadway Chicago, Illinois	9/17/47	10/2/47
34.	Dean Milk Company 20 North Wacker Drive Chicago 6, Illinois	9/17/47	10/3/47
35.	Sidney Wanzer & Sons, Inc. 123 West Garfield Boulevard Chicago 9, Illinois	9/17/47	10/2/47
36.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/8/47	12/12/47
37.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/8/47	12/10/47
38.	The Borden Company 3638 North Broadway Chicago, Illinois	1/16/48	2/16/48
39.	National Tea Company 1000 Crosby Street Chicago, Illinois	2/4/48	2/16/48

		Date Issued	Returnable
40.	The Borden Company 3638 North Broadway Chicago, Illinois	1/19/48	2/16/48
41.	The Kroger Company 33 South Clark Street Chicago, Illinois	2/4/48	2/16/48
42.	High-Low Foods, Inc. 30 West 87th Street Chicago, Illinois	2/4/48	2/16/48
111 43.	The Great Atlantic & Pacific Tea Company 2622 North Pulaski Road Chicago, Illinois	2/4/48	2/16/48
44.	Jewel Tea Company Barrington, Illinois	2/4/48	2/16/48
45.	J. H. Greenhalgh & Company 1 North La Salle Street Chicago, Illinois	11/14/47	11/21/47
46.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/10/47	12/12/47
47.	Beloit Dairy Company 218 West Chestnut Street Chicago, Illinois	12/10/47	12/12/47
48.	R. P. Alexander, Comptroller Pure Milk Association 608 South Dearborn Street Chicago, Illinois	12/16/47	12/17/47
49.	Milk Wagon Drivers Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America 220 South Ashland Boulevard Chicago, Illinois	9/19/47	10/6/47
50.	Bowman Dairy Company 140 West Ontario Street Chicago, Illinois	12/8/47	12/10/47
51.	Milk Vendors Association 111 West Monroe Street Chicago, Illinois	9/19/47	10/6/47

	Date Issued	Returnable
52. Dairy Employees Union, Local 754, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America 220 South Ashland Boulevard Chicago, Illinois	9/23/47	10/6/47
53. Chicago Milk Dealers Association 6607 South Greenwood Avenue Chicago, Illinois	9/19/47	10/6/47
54. Associated Milk Dealers, Inc. 309 West Jackson Chicago, Illinois	9/19/47	10/6/47
55. Progressive Milk Dealers Association 1 North La Salle Street Chicago, Illinois	9/19/47	10/6/47
56. Harris Trust & Savings Bank 115 West Monroe Street Chicago, Illinois	2/19/48	2/20/48

112 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This matter coming on to be heard on the defendants' motions for a subpoena for production of documentary evidence pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, and the Court having heard and considered the arguments of counsel and having read and considered the briefs presented by counsel in support of their positions,

It Is Ordered that the books, papers, and documents designated in the subpoena directed to Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Esq., Special Assistant to the Attorney General, a copy of which is attached hereto, be produced by the Government at the office of the De-

partment of Justice, Antitrust Division, located at 208 South La Salle Street, Chicago, Illinois, on November 15th, 1949, and that the defendants and their attorneys, proceeding with reasonable dispatch, be permitted to inspect and copy or photograph such books, papers and documents on the date specified above and succeeding days, and that the Government attorneys make available suitable accommodations for such inspection and copying or photographing, and

It Is Further Ordered that except as hereinabove provided the defendants' motions for a subpoena for production of documentary evidence, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure be, and the same hereby are denied.

John P. Barnes,
United States District Judge.

Dated: November 7th, 1949.

SUBPOENA DUCES TECUM.

Case No. 48 CR 360.

DISTRICT COURT OF THE UNITED STATES OF AMERICA

Northern District of Illinois.

The President of the United States of America To Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, U. S. Court House, Chicago, Illinois, and Willis Hotchkiss, Esq., Special Assistant to the Attorney General, Suite 826, 206 S. La Salle Street, Chicago, Illinois—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for said District, at a time and place to be specified in an order of said Court, in a certain cause now pending and undetermined in said Court, wherein United States of America is Plaintiff and Bowman Dairy Company, et al., are Defendants, on the part of the defendants. And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce

at the time and place aforesaid, all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or paper solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshall of the Northern District of Illinois to execute and return in due form of law.

Witness, the Honorable John P. Barnes, Judge of the said Court, at Chicago, in said District, this 1st day of November, in the year of our Lord one thousand nine hundred and 49, and of the Independence of the United States of America the 174th year.

Roy H. Johnson,
Clerk.

(Seal Copy)

Endorsed: District Court of the United States. * * (Caption—48-Cr-360) * *. Subpoena Duces Tecum. Montgomery, Hart, Pritchard & Harriott, 120 S. La Salle St., Chgo., Ill. Mayer, Meyer, Austrian & Platt, 231 S. La Salle St., Chgo., Ill. Sidley, Austin, Burgess & Harper, 11 S. La Salle St., Chgo., Ill. Campbell, Clithero & Fischer, 1 N. La Salle St., Chgo., Ill. Isidore and Herbert B. Fried, 111 W. Monroe St., Chgo., Ill. Packard, Barnes, Schumacher, Gilmore & Van Ness, 38 S. Dearborn, Chgo., Ill. Charles W. Schaub, 120 S. La Salle St., Chgo., Ill., Attorneys for Defendants.

115 And afterwards, to wit, on the 14th day of November, 1949, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

116 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

Upon stipulation of the parties, it is ordered that the order dated November 7, 1949 directing Otto Kerner, Jr. and Willis L. Hotchkiss, Esq. to produce certain books, papers, and documents designated in a subpoena attached to said order, be amended by changing the return date from November 15, 1949 to November 28, 1949.

Enter:

John P. Barnes,
Judge.

Date: November 14, 1949.

117 And afterwards on, to wit, the 28th day of November, 1949, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion to Quash Subpoena in words and figures following, to wit:

118 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION TO QUASH SUBPOENA.

The United States of America, by its attorneys, moves to quash (a) the subpoena served November 1, 1949, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, at the instance of the defendants herein, on Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, and (b) set aside the order entered by this Court on November 7, 1949, directing the said attorneys for the Government to produce for inspection and

copying by the defendants the books, papers, documents, and objects designated in the aforesaid subpoena.

The grounds for this motion to quash are that:

(a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17 (c) of the Federal Rules of Criminal Procedure, issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants and
119 their attorneys, the boooks, papers, documents and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

Willis L. Hotchkiss,
Special Assistant to the Attorney General.
Suite 820,
208 South La Salle Street,
Chicago 4, Illinois,
Central 6-6886.

120 And on the same day, to wit, on the 28th day of November, 1949, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

121 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

This cause this day coming on for hearing on the motion of the United States by the United States Attorney to quash the subpoena issued herein under Rule 17(c) of the Federal Rules of Criminal Procedure and to set aside the order entered herein on November 7, 1949 come the parties by their counsel and on agreement of the parties by counsel now made in open Court further arguments and further briefs are waived and said motion to quash and set aside the order entered on November 7, 1949 is hereby taken under advisement by the Court.

122 And afterwards on, to wit, the 27th day of December, 1949, there was filed in the Clerk's office of said Court a certain Memorandum of the Court in words and figures following, to wit:

123 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

MEMORANDUM.

This cause came on to be heard on the motions of the defendants (1) for bills of particulars; (2) to strike surplusage from the indictments; and (3) for subpoenas for production of documentary evidence pursuant to Rule 17(c). Briefs were filed by counsel for the respective parties and have been considered by the court, the oral arguments of counsel have been heard and considered by the court. The motions of the defendants for subpoenas for production of documentary evidence pursuant to Rule 17(c) have heretofore been granted, but counsel for the Government, on

November 28, 1949, moved to quash the subpoenas served November 1, 1949, pursuant to Rule 17(c) and to set aside the order rendered November 7, 1949. Upon the hearing of said motion to quash, both sides waived the filing of further briefs and the making of further arguments.

The foregoing motions and the briefs and arguments of the respective parties for and against the granting of said motions having been considered by the court, the court is of opinion:

124 1. That the motion for bills of particulars may be granted to the extent that they ask for the names of officers and agents through whom a firm or corporation became a party to the conspiracy and the time when it is contended each defendant joined the conspiracy. To the extent that they ask for other particulars they may be denied.

2. That the motions of defendants to strike surplusage from the indictment may be allowed; and

3. That the motion of the Government to quash the subpoena served November 1, 1945, pursuant to Rule 17(c) and to set aside the order entered on November 7, 1949, may be denied.

Appropriate orders may be made on January 4, 1950, at 10 o'clock A. M., without other notice than this.

John P. Barnes,
Judge.

December 27, 1949.

125 And afterwards on, to wit, the 10th day of January, 1950, there was filed in the Clerk's office of said Court a certain Transcript of Proceedings Had on January 4 and 5, 1950, Before the Honorable John P. Barnes, Judge, in words and figures following, to wit:

126 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360-1-2) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable John P. Barnes, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, on January 4, 1950, beginning at 10:00 o'clock a. m.

127 Present:

Willis L. Hotchkiss, Esq., Special Assistant to the Attorney General; Paul V. Ford, Esq., Harry H. Faris, Esq., George E. Leonard, Esq., Dorothy M. Hunt, Special Attorneys; Robert W. Brunn, Esq., appearing on behalf of the Government;

L. Edward Hart, Jr., Esq., Leo F. Tierney, Esq., Donald M. Braham, Esq., Messrs. Montgomery, Hart, Pritchard & Herriott, Messrs. Mayer, Meyer, Austrian & Platt, appearing on behalf of Bowman Dairy Company, J. A. Bowman, F. H. Kullman, Jr., E. J. Larson, M. M. Metzger, David B. Peck and D. Cameron Peck;

Walter J. Cummings, Jr., Esq., Joseph A. Greaves, Esq., Messrs. Sidley, Austin, Burgess & Harper, appearing on behalf of The Borden Company, H. H. Inglehart and O. N. Koenig.

And other counsel.

128 And thereupon the following proceedings were had herein:

By the Clerk: No. 48 CR 360, United States *vs.* Bowman Dairy Company, et al.

No. 48 CR 361, United States *vs.* Bowman Dairy Company, et al.; and

No. 48 CR 362, United States *vs.* The Borden Company.

By Mr. Hart: If the Court please, we have here the orders that were suggested by your memorandum in all the cases.

They are separate, each one covering one of the motions in the various separate cases, in accordance with the memorandum that your Honor filed on December 27th.

By the Court: These have been circulated, have they?

By Mr. Hart: We have not seen the Government's. They have just been handed me.

I assume that none of them are very complicated, in that they follow in Nos. 361 and 362 wherein the two motions were simply denied in toto, so that I cannot conceive that we will have any objections.

By the Court: How about the orders in No. 360, is there any question whether they comply with what the
129 Court directed to be done?

By Mr. Hotchkiss: No, sir.

By the Court: If there is not, I will sign them: Ordered that the plaintiff file such specifications within blank days from the date of this order. How many days?

By Mr. Hart: They ask thirty, and that is agreeable to us, if the Court please.

By the Court: Is there any contention that the draft of the orders in No. 361 does not comply with what the court directed to be done?

By Mr. Hart: I have only seen one of them. That has to do with surplusage. That apparently is in order. I do not have a copy of the other, but if it merely denies—

By the Court: I only see one.

By Mr. Hart: Oh, wait a minute. I guess that covers both.

I have one that is numbered 362; that apparently corresponds with your memorandum in that both the motions for bill of particulars and to strike surplusage were denied in toto.

By the Court: No. 361 is the same?

By Mr. Hart: I think both of them are the same, if the Court please.

130 Now, if the Court please, as the matter now stands, there was an order of the Court that we be allowed to inspect those documents, starting November 15th, which by further order was extended to November 28th.

At that time the Government filed a motion to quash that subpoena.

I think it might be in order now to set some date at which

point we could begin to examine the documents, if the Government is going to agree to it.

By the Court: When do you want to begin?

By Mr. Hart: Well, any date from now on, we are perfectly willing to begin.

By the Court: Has the Government any suggestions?

By Mr. Hotchkiss: Your Honor, the Government has a written statement to submit to the Court at this time. (Handing document to the Court.)

I call your attention to the last paragraph.

By Mr. Tierney: May we have a copy of it?

By Mr. Hotchkiss: Yes. (Handing document to counsel.)

I call attention to the last paragraph of the statement, this, my statement, in which I say, "For the foregoing reasons"—

131 By the Court: Well, let me read it all so that I know what is in it.

(After a brief interval.)

By the Court: I have read this statement.

Have counsel for the defendants read it?

By Mr. Hart: I have read it hastily, if the Court please.

By Mr. Hotchkiss: The defendants have been advised as to the action that the Government would take.

By the Court: If you gentlemen have any matters to submit to the Court, the Court is here. Otherwise I will transfer my attention to some other matter.

By Mr. Hart: Well, if the Court please, we have been advised as to the general nature of this statement to be made by Mr. Hotchkiss.

And we have prepared a motion—which we had to prepare prior to seeing this statement; I think, however, it covers the facts and perhaps is not at variance with the facts as stated in the statement, the motion being to adjudge the Attorney General, or the Assistant to the Attorney General, Mr. Willis L. Hotchkiss, in contempt.

By the Court: Let me see it.

(Document handed to the Court.)

By Mr. Hart: Under Rule 17(g) of the Federal
132 Rules of Criminal Procedure—

By the Court: You mean that you gentlemen did not see this communication which counsel handed to the Court a moment ago?

By Mr. Hart: No. We had a conference with Mr. Hotchkiss—

By the Court: Well, then, the thing for you to do is to consider until two o'clock.

By Mr. Hart: Very well.

By the Court: And then if you desire to make any motions, I will hear you.

(Whereupon the further hearing of the above entitled matters was continued until 2:00 o'clock p. m. of the same day, January 4, 1949.)

133 Chicago, Illinois,
January 4, 1950,
2:00 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Hotchkiss,
Mr. Ford,
Mr. Faris,
Mr. Leonard,
Miss Hunt,
Mr. Brunn,
Mr. L. Edward Hart,
Mr. Tierney,
Mr. Braham,
Mr. Cummings,
Mr. Greaves,
And other counsel.

134 And thereupon the following further proceedings were had herein:

By the Clerk: No. 48 CR 360, United States *vs.* Bowman Dairy Company, et al.

(Mr. Hart handed a document to the Court.)

By Mr. Hart: If the Court please, we have made some slight changes in the motion that we first offered this morning, in order to make the allegations of some parts of the motion agree with the affidavit that Mr. Hotchkiss filed.

The motion is in the alternative, asking that the Court order the staying of further proceedings in this case, or adjudge Willis L. Hotchkiss in contempt of court until such time as he shall obey the subpoena duces tecum which issued —which it attached to the motion, marked "Exhibit A"; and the order of court entered on November 7—which is attached to the motion, marked "Exhibit C"; the order

being that starting on November 15, 1949, they make available to us the various documents, books, papers and objects designated in the subpoena itself.

In view of the affidavit I wish also to call to your Honor's attention the reply—as you might call it, and the
135 grounds set forth in the affidavit, under paragraph 7.

The grounds there listed in the affidavit under paragraphs (a), (b) and (c)—all small letters—in the Hotchkiss affidavit are exactly the same grounds that were set forth in the motion to quash the subpoena, filed on behalf of the Government—paragraph 7 of the motion pointing out further discrepancies in connection with the affidavit and the actual request of the subpoena.

By the Court: Is there anything further to be said in behalf of the United States or Mr. Hitchkiss?

By Mr. Hotchkiss: I think, your Honor, the statement which I submitted to the Court this morning covers the Government's position on the matter.

By the Court: Has the Government anything to say with respect to that part of the defendants' motion which asks for an order staying the further proceedings in the above-entitled cause?

By Mr. Hotchkiss: Your Honor, I question whether such an order would be proper in the premises of this proceeding—this case. There is a question as to whether such an order would be an appealable order; and the Criminal Rules, as I see them, do not provide for such relief on refusal to comply with the terms of the subpoena duces
136 tecum. The relief provided for is set forth in Rule 17(g).

By Mr. Hart: If the Court please, in connection with that statement, Rule 17(g) does provide that the court may find an individual who does not respond to a subpoena under that section, in contempt.

On the other hand, going back to Chapter 21 of the new statutes, and to Section 402 thereof, on contempt, it provides certain specific remedies which may be granted in specific instances of contempt, and thus allows the Court any discretion that it might have in the ordinary legal proceeding if the case does not fall within those specified cases.

This does not. It falls within the exception, that is, failure to comply with an order of the court. And we feel that your Honor would have the general common law rights.

Now, by analogy, under the Civil Rules one of the remedies for failure to respond to a subpoena is set forth in Rule

37 under Section (2) thereof, (i), or 35(i), where it states, "or staying further proceedings until the order is obeyed".

Now, we feel in view of Mr. Hotchkiss' affidavit which sets out that his position in this case is one dictated by the Attorney General—we feel that the case is one where perhaps the ordinary punishment for contempt is not
137 particularly appropriate; that the purpose of the court probably should be to seek the enforcement of the order the court entered, and we feel that the staying of proceedings is an appropriate way to enforce that order.

Now, if the Government, as it contends, claims that the court has exceeded its jurisdiction in entering the order it did, and granting the subpoena that has been granted, they have a way to test that, whether the order be one staying the proceedings, or fining the defendant or sentencing the defendant for any contempt.

By the Court: Well, I haven't any doubt about the power of the court to stay the proceedings. This is an adversary proceeding in which the United States is plaintiff. Mr. Hotchkiss is attorney for the plaintiff and stands in contempt of the court for refusal to exhibit to the defendants material which the court has held relevant to the issues.

Now, I cannot believe that even the United States can just come into a court of the United States where this material might be material which would conclusively negative the charges in this indictment—it might be and I
138 assume the defendants might think that the material will have some tendency to prove their innocence—now I cannot believe that the United States can stand in a court of justice and say, "We will not produce this evidence", and yet insist upon going ahead with the prosecution.

But I don't need to worry about that at the moment.

Have you a draft of an order—?

By Mr. Hart: We have not prepared one.

By the Court: (Continuing.) —adjudging Mr. Hotchkiss in contempt of court?

By Mr. Hart: We have not prepared one in that alternative way on that part of the motion. We would be glad to prepare and submit it at any time you wish.

By the Court: Suppose you do that, and bring it in tomorrow morning?

By Mr. Hart: Very well, sir.

Will you suggest which of the alternatives, or upon which of them you would wish it drawn?

By the Court: What?

By Mr. Hart: Our motion is that further proceedings be stayed.

By the Court: Well, I thought I had covered that.
139 Perhaps I was vague. I say it is unnecessary for me to determine as to whether I have such power or not. I think I have. But it is not necessary for me to exercise that power at the moment. And as to the exercise of the other alternative, that will doubtless give the United States an opportunity to test out the question as to whether or not the court is right.

Now, we might just as well think about this a moment. When the United States stands in this court or in any other court and says that it has a right to maintain in the files of its officers papers which may be relevant to the issues to be determined in court—when the United States says that it has a right to do that and to refuse such information to parties litigant, then it is taking a long, long step toward a police state.

That is exactly what you are doing. You might as well realize that, that if you are sustained in this position which you are taking here which you do by the direction of the Attorney General, then you and your associates are taking a long, long step toward a police state, and you are saying in effect that, "the court shall not determine whether papers which we have in our control have any bearing upon
140 these issues; we determine that, we, the police power of the United States are going to determine that, and the courts are not permitted to do that."

Now, if we are going to take that long, long step toward the police state which you propose to take, and which you will take right now—and will take if this court and other courts permit you, you do it without any voluntary co-operation. Some other court that has more power than I will say that you have a right to take that step, which I say is a step toward the police state.

Bring in an order tomorrow morning.

By Mr. Hart: Yes, sir.

(Whereupon the further hearing of the above-entitled matter was continued until the following day, January 5, 1950, at the hour of 10:00 o'clock a. m.)

141 Chicago, Illinois,
January 5, 1950,
10:00 o'clock a.m.

Met pursuant to adjournment.

Present:

Mr. Hotchkiss.
Mr. Ford.
Mr. Hart.
Mr. Tierney.
Mr. Cummings.
And other counsel.

142 And thereupon the following further proceedings were had herein:

By the Clerk: No. 48 CR. 360, United States *vs.* Bowman Dairy Company, et al.

By Mr. Hart: If the Court please, we have prepared that order.

By the Court: Have you circularized it?

By Mr. Hart: Yes, Mr. Ford and—

By the Court: Circulated, I guess would be better.

By Mr. Hart: Mr. Ford and Mr. Hotchkiss I believe have both seen it.

By Mr. Hotchkiss: That is correct.

By the Court: Any objection to the form of this order?

By Mr. Ford: No, sir.

By Mr. Hotchkiss: No objection to the form, your Honor.

144 And to wit, on the 4th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

145 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This cause coming on to be heard pursuant to a Memorandum heretofore filed in the above entitled cause, dated December 27, 1949,

It Is Hereby Ordered, Adjudged And Decreed that the motion of the United States of America heretofore filed on November 28, 1949, to quash the Subpoena Duces Tecum served upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis Hotchkiss, Special Assistant to the Attorney General, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, be and the same is hereby denied.

Enter:

By John P. Barnes,
Judge.

Dated: January 4, 1950.

146 And on the same day, to wit, the 4th day of January, 1950 came the Willis L. Hotchkiss, pro se, and filed in the Clerk's office of said Court his certain Statement Refusing To Comply With Order Of November 7, 1949 and Subpoena in words and figures following, to wit:

147 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

STATEMENT OF WILLIS L. HOTCHKISS, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL, REFUSING TO COMPLY WITH ORDER OF NOVEMBER 7, 1949 AND SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Willis L. Hotchkiss, being duly sworn, states that he is employed by the United States Department of Justice as a Trial Attorney, and in that capacity is an authorized assistant of the Attorney General, and is Chief of the Midwest (Chicago) Office of the Antitrust Division, Department of Justice, Suite 820, 208 South LaSalle Street, Chicago 4, Illinois.

On November 1, 1949, there was served on him a subpoena directed to him and Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, United States Court House, Chicago, Illinois, calling on such attorneys for the Government to produce certain designated books,

records, documents, and objects, and such subpoena was accompanied by a draft order, tendered pursuant to the defendants' motions as filed June 13, 1949, for a subpoena for production of documentary evidence under Rule 17(c) of the Federal Rules of Criminal Procedure, directing the said attorneys for the Government to make available to the defendants and their attorneys, for inspection and copying or photographing, the books, papers, documents, and objects designated in the aforesaid subpoena.

148 Thereafter, on November 7, 1949, a hearing was had before this Court on defendants' motions for such subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure, and this Court granted the said motion of the defendants and entered an order directing the said attorneys for the Government to make available, for inspection, copying or photographing by the defendants and their attorneys, the books, papers, and documents and objects designated in the aforesaid subpoena.

On November 28, 1949, the plaintiff, by its attorneys, filed a motion to quash the aforesaid subpoena and to set aside the aforesaid order of November 7, 1949 under which the attorneys for the Government are ordered to comply with the aforesaid subpoena. Upon the hearing of said motion to quash and set aside, both sides waived the filing of further briefs and the making of further arguments. The Court thereafter, on December 27, 1949, filed its memorandum opinion denying the Government's motion to quash the said subpoena and to set aside the order of November 7, 1949 with reference to such subpoena. An order pursuant to such memorandum opinion was entered by the Court on January 4, 1950.

Deponent states that he is, as Chief of the Midwest Office of the Antitrust Division, the custodian of all of the documents, books, papers, and objects designated in the aforesaid subpoena, and that none of such documents, books, records, or objects are in the possession or custody of Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and that the said Otto Kerner, Jr., is, therefore, unable to respond to the said subpoena and the order of this Court entered on November 7, 1949 with reference to said subpoena.

The Government makes the following contentions with respect to the aforesaid subpoena duces tecum and order:

149 (a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17(c) of the Federal Rules of Criminal Procedure, properly issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants and their attorneys, the books, papers, documents, and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

In addition, it is apparent, from the scope of designation of the aforesaid subpoena duces tecum, that it calls for the production of privileged documents, including, among others, documents which the Government might have secured from confidential and voluntary informants, and that the disclosure of such documents to defendants in criminal proceedings pursuant to subpoena issued under Rule 17(c) would be against public policy and would prevent and impede the Government in this and other criminal proceedings from securing from voluntary informants the benefit of their voluntary disclosure to the Government of information and documents relating to possible violations of the criminal statutes of the United States.

Deponent, for the foregoing reasons, and acting on the advice and instructions of the Attorney General of the United States and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, respectfully declines to produce for the defendants and their attorneys, pursuant to the terms of the aforesaid

order entered in this cause on November 7, 1949, any of the books, papers, documents, or other objects designated in the aforesaid subpoena issued under Rule 17(c).

Willis L. Hotchkiss.

Subscribed and sworn to before me this 4th day of January, 1950.

Kathryn M. Reilly.
Notary Public.

(Seal)

My commission expires March 23, 1953.

151 And on the same day, to wit, the 4th day of January, 1950 came the Defendants by their respective attorneys and filed in the Clerk's office of said Court their certain Motion To Enter An Appropriate Order With Respect To The Refusal Of Willis L. Hotchkiss, Special Assistant To The Attorney General, To Comply With A Subpoena Duces Tecum And With An Order Of This Court Entered Herein On November 7, 1949, in words and figures following, to wit:

152 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION TO ENTER AN APPROPRIATE ORDER WITH RESPECT TO THE REFUSAL OF WILLIS L. HOTCHKISS, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL, TO COMPLY WITH A SUBPOENA DUCES TECUM AND WITH AN ORDER OF THIS COURT ENTERED HEREIN ON NOVEMBER 7, 1949.

Defendants represent to the Court as follows:

1. That on November 1, 1949, at defendants' request, the Clerk of this Court issued a Subpoena Duces Tecum directed to Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, commanding them to diligently and carefully search for, examine, and inquire after and bring with them and produce, at a time and place to be specified by order of this Court, certain documents, books, papers, and objects designated in said

Subpoena, a copy of which Subpoena Duces Tecum is attached hereto as Exhibit A.

2. Service of the said Subpoena Duces Tecum was made upon Otto Kerner, Jr. on November 3, 1949, and Willis L. Hotchkiss on November 1, 1949, at their usual places of business in Chicago, Illinois, by delivering a copy thereof to them and by tendering them the fees for one day's attendance and the mileage allowed by law as more
153 fully appears from the affidavits of Charles F. Simon, attached hereto as Exhibit B.

3. That thereafter, on November 7, 1949, pursuant to stipulation, there came on to be heard by this Court the matter of settling the time and place at which the documents, books, papers and objects designated in the said Subpoena should be produced by the said Otto Kerner, Jr. and Willis L. Hotchkiss for inspection by the defendants, and that this Court, having heard and considered the arguments of counsel and having read and considered the briefs presented by counsel in support of their positions, ordered that such documents, books, papers and objects be produced for inspection by the defendants at the Office of the Department of Justice, Anti-Trust Division, located at 208 South LaSalle Street, Chicago, Illinois, on November 15, 1949, and that such inspection and examination continue thereafter until completed. A copy of such order is attached hereto as Exhibit C.

4. That thereafter, the date for the production of such documents, books, papers and objects was, in accordance with stipulation, continued to November 28, 1949. That thereafter on to-wit, November 28, 1949, a certain motion to quash the said Subpoena Duces Tecum was filed on behalf of the United States of America, plaintiff in the above entitled cause, a copy of which motion to quash the Subpoena Duces Tecum is attached hereto and marked Exhibit D.

5. That thereafter on to-wit, January 4, 1950, pursuant to a Memorandum filed in the above entitled cause by the Court, and without further notice in accordance with such Memorandum, an order dated January 4, 1950, deny-
154 ing the motion to quash such Subpoena Duces Tecum was entered by this Court, a copy of which order is attached hereto as Exhibit E.

6. That the said Willis L. Hotchkiss, Special Assistant to the Attorney General, on January 4, 1950, filed an affi-

davit (hereto attached and marked Exhibit F) in open court stating that he refuses to comply with the said Subpoena and order of the Court heretofore entered on November 7, 1949 (hereto attached and marked Exhibit C), and that he will continue to refuse and fail to comply with the said order and the said Subpoena Duces Tecum (hereto attached and marked Exhibit A), which refusal is without adequate excuse.

7. The grounds set forth in said affidavit as the basis for the refusal to comply with said Subpoena Duces Tecum do not constitute an adequate excuse for such refusal for the following reasons:

(a) The affidavit incorrectly characterizes the Subpoena as calling "for the production of privileged documents," but it does not appear from said affidavit or otherwise that the affiant has in his custody any privileged documents coming within the purview of said Subpoena.

(b) The Subpoena expressly excludes "memoranda prepared by Government counsel and documents or papers solicited by or volunteered to Government counsel, which consist of narrative statements of persons or memoranda of interviews."

(c) Contrary to said affidavit, the Subpoena Duces Tecum does not require the Government to disclose "Information" relating to possible violation of the crim-
155 inal statutes of the United States.

(d) Affiant has refused the production of "any of the books, papers, documents, or other objects designated in the aforesaid Subpoena issued under Rule 17(c)" and such refusal is without limitation or qualification.

(e) The grounds stated in clauses (a), (b) and (c) of the Hotchkiss affidavit, and the statements with regard to public policy thereafter appearing therein, amount to a statement that it is contrary to public policy for the Court to permit defendants to exercise the privileges conferred upon them by Rule 17(c) of the Federal Rules of Criminal Procedure. Said affidavit constitutes a request that the Court amend or abrogate the Federal Rules of Criminal Procedure.

Wherefore defendants move the Court for an order staying further proceedings in the above entitled cause, or, adjudging the said Willis L. Hotchkiss in contempt of this Court, until such time as he shall obey the Subpoena Duces Tecum, hereto attached and marked Exhibit A, and

the order of this Court entered on November 7, 1949, hereto attached and marked Exhibit C.

Bowman Dairy Company	William R. Boruszak
American Processing and Sales Company	Hyman I. Freed
	H. H. Inglehart
Beloit Dairy Company	Walter F. Kettell
The Borden Company	O. N. Koenig
Capitol Dairy Company	Francis H. Kullman, Jr.
Hunding Dairy Company	S. D. McGuire
Meadowmoor Dairies, Inc.	D. Cameron Peck
Western United Dairy Company	O. O. Smaha

By their respective attorneys.

L. Edward Hart, Jr.

156 Exhibit A.

SUBPOENA DUCES TECUM.

Case No. 48 Cr. 360.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

Northern District of Illinois.

The President of the United States of America to Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, U. S. Court House, Chicago, Illinois, and Willis Hotchkiss, Esq., Special Assistant to the Attorney General, Suite 826, 208 S. LaSalle Street, Chicago, Illinois,—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before the Honorable John P. Barnes, one of the Judges of the District Court of the United States for said District, at a time and place to be specified in an order of said Court, in a certain cause now pending and undetermined in said Court, wherein United States of America is Plaintiff and Bowman Dairy Company, et al., are Defendants, on the part of the defendants And that you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, all documents, books, papers and objects (except memoranda prepared

by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. And this you shall in nowise omit, under the penalty of the law in that case made and provided.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

Witness, the Honorable John P. Barnes, Judge of the said Court, at Chicago, in said District, this 1st day of November, in the year of our Lord one thousand nine hundred and 49 and of the Independence of the United States of America the 174th year.

Roy H. Johnson,
Clerk.

(Seal Copy)

Endorsed: District Court of the United States * * (Caption—48-Cr.-360) * * Subpoena Duces Tecum. Montgomery, Hart, Pritchard & Herriott, 120 S. LaSalle St., Chgo., Ill.; Mayer, Meyer, Austrian & Platt, 231 S. LaSalle St., Chgo., Ill.; Sidley, Austin, Burgess & Harper, 11 S. LaSalle St., Chgo., Ill.; Campbell, Clithero & Fischer, 1 N. LaSalle St., Chgo., Ill.; Isidore and Herbert B. Fried, 111 W. Monroe St., Chgo., Ill.; Packard, Barnes, Schumacher, Gilmore & Van Ness, 35 S. Dearborn, Chgo., Ill.; Charles W. Schaub, 120 S. LaSalle St., Chgo., Ill., Attorneys for Defendants.

157 Exhibit B.

UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

AFFIDAVIT OF SERVICE OF SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Charles F. Simon, being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 2209 Ridge Avenue, Evanston, Illinois. On the 1st day of November, 1949, at 208 South La Salle Street, Chicago, Illinois, I served the annexed subpoena duces tecum on Willis L. Hotchkiss, United States Attorney, by exhibiting to him the original subpoena and delivering to and leaving personally with him a true copy thereof, and at the same time tendered to him the sum of Four Dollars and Fourteen Cents ($4.14), the fee required by law for attendance at Court as witness in the above entitled proceeding. The aforementioned witness fee was accepted refused by the said Willis L. Hotchkiss. At the time of such service I knew the said Willis L. Hotchkiss to be the individual mentioned and described in said subpoena duces tecum.

/s/ Charles F. Simon.

Subscribed and sworn to before me this 1st day of November, 1949.

.....

Notary Public.

My Commission Expires .....

158 Exhibit C.

UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

ORDER.

This matter coming on to be heard on the defendants' motions for a subpoena for production of documentary evidence pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, and the Court having heard and considered the arguments of counsel and having read and considered the briefs presented by counsel in support of their positions,

It Is Ordered that the books, papers, and documents designated in the subpoena directed to Otto Kerner, Jr., Esq., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Esq., Special Assistant to the Attorney General, a copy of which is attached hereto, be produced by the Government at the office of the Department of Justice, Antitrust Division, located at 208 South La Salle Street, Chicago, Illinois, on November 15, 1949, and that the defendants and their attorneys, proceeding with reasonable dispatch, be permitted to inspect and copy

159 or photograph such books, papers and documents on the date specified above and succeeding days, and that the Government attorneys make available suitable accommodations for such inspection and copying or photographing, and

It Is Further Ordered that except as hereinabove provided the defendants' motions for a subpoena for production of documentary evidence, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure be, and the same hereby are denied.

/s/ John P. Barnes,
United States District Judge.

Dated: November 7, 1949.

160 Exhibit D.

UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

MOTION TO QUASH SUBPOENA.

The United States of America, by its attorneys, moves to quash (a) the subpoena served November 1, 1949, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, at the instance of the defendants herein, on Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, and (b) set aside the order entered by this Court on November 7, 1949, directing the said attorneys for the Government to produce for inspection and copying by the defendants the books, papers, documents, and objects designated in the aforesaid subpoena.

The grounds for this motion to quash are that:

(a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17(c) of the Federal Rules of Criminal Procedure, issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants
161 and their attorneys, the books, papers, documents and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

s/ Willis L. Hotchkiss,
Special Assistant to the Attorney General,
Suite 820,
208 South La Salle Street,
Chicago 4, Illinois,
Central 6-6886.

162 Exhibit E.

UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

ORDER.

This cause coming on to be heard pursuant to a Memorandum heretofore filed in the above entitled cause, dated December 27, 1949,

It Is Hereby Ordered, Adjudged And Decreed that the motion of the United States of America heretofore filed on November 28, 1949, to quash the Subpoena Duces Tecum served upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis Hotchkiss, Special Assistant to the Attorney General, pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, be and the same is hereby denied.

Enter:

By .....,

Dated: January 4, 1950. *Judge.*

163 Exhibit F.

UNITED STATES DISTRICT COURT.
* * (Caption—48-Cr.-360) * *

STATEMENT OF WILLIS L. HOTCHKISS, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL, REFUSING TO COMPLY WITH ORDER OF NOVEMBER 7, 1949 AND SUBPOENA.

State of Illinois, } ss.
County of Cook. }

Willis L. Hotchkiss, being duly sworn, states that he is employed by the United States Department of Justice as a Trial Attorney, and in that capacity is an authorized assistant of the Attorney General, and is Chief of the Midwest (Chicago) Office of the Antitrust Division, Department of Justice, Suite 820, 208 South LaSalle Street, Chicago 4, Illinois.

On November 1, 1949, there was served on him a subpoena directed to him and Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, United States Court House, Chicago, Illinois, calling on such attorneys for the Government to produce certain designated books, records, documents, and objects, and such subpoena was accompanied by a draft order, tendered pursuant to the defendants' motions as filed June 13, 1949, for a subpoena for production of documentary evidence under Rule 17(c) of the Federal Rules of Criminal Procedure, directing the said attorneys for the Government to make available to the defendants and their attorneys, for inspection and copying or photographing, the books, papers, documents, and objects designated in the aforesaid subpoena.

164 Thereafter, on November 7, 1949, a hearing was had before this Court on defendants' motions for such subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure, and this Court granted the said motion of the defendants and entered an order directing the said attorneys for the Government to make available, for inspection, copying or photographing by the defendants and their attorneys, the books, papers, and documents and objects designated in the aforesaid subpoena.

On November 28, 1949, the plaintiff, by its attorneys, filed a motion to quash the aforesaid subpoena and to set aside the aforesaid order of November 7, 1949 under which the attorneys for the Government are ordered to comply with the aforesaid subpoena. Upon the hearing of said motion to quash and set aside, both sides waived the filing of further briefs and the making of further arguments. The Court thereafter, on December 27, 1949, filed its memorandum opinion denying the Government's motion to quash the said subpoena and to set aside the order of November 7, 1949 with reference to such subpoena. An order pursuant to such memorandum opinion was entered by the Court on January 4, 1950.

Deponent states that he is, as Chief of the Midwest Office of the Antitrust Division, the custodian of all of the documents, books, papers, and objects designated in the aforesaid subpoena, and that none of such documents, books, records, or objects are in the possession or custody of Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and that the said Otto Kerner, Jr., is, therefore, unable to respond to the said subpoena and the order

of this Court entered on November 7, 1949 with reference to said subpoena.

The Government makes the following contentions with respect to the aforesaid subpoena duces tecum and order:

165 (a) A subpoena for the production of books, papers, documents or other objects may not, under Rule 17(c) of the Federal Rules of Criminal Procedure, properly issue against an attorney for the Government;

(b) This Court acted outside the scope of its jurisdiction in ordering that Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, produce, for inspection and copying by the defendants and their attorneys, the books, papers, documents, and objects designated by a subpoena issued under Rule 17(c) of the Federal Rules of Criminal Procedure against such attorneys for the Government;

(c) The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government, as such term is defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records, documents, or other objects in the custody of an attorney for the Government.

In addition, it is apparent, from the scope of designation of the aforesaid subpoena duces tecum, that it calls for the production of privileged documents, including, among others, documents which the Government might have secured from confidential and voluntary informants, and that the disclosure of such documents to defendants in criminal proceedings pursuant to subpoena issued under Rule 17(c) would be against public policy and would prevent and impede the Government in this and other criminal proceedings from securing from voluntary in-

166 formants the benefit of their voluntary disclosure to the Government of information and documents relating to possible violations of the criminal statutes of the United States.

Deponent, for the foregoing reasons, and acting on the advice and instructions of the Attorney General of the

United States and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, respectfully declines to produce for the defendants and their attorneys, pursuant to the terms of the aforesaid order entered in this cause on November 7, 1949, any of the books, papers, documents, or other objects designated in the aforesaid subpoena issued under Rule 17(c).

Willis L. Hotchkiss.

Subscribed and sworn to before me this ..... day of ....., 1950.

.....,
Notary Public.

My commission expires March 23, 1953.

167 And on the same day, to wit, on the 4th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

168 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

This day comes the United States by the United States Attorney come also the defendants by counsel and present herein a motion that Willis L. Hotchkiss, Special Assistant to the Attorney General of the United States, be held in contempt of Court which motion is entered and continued to January 5, 1950, at 10:00 o'clock A.M. for the entry of an order adjudging said Willis L. Hotchkiss in contempt of Court.

169 And afterwards, to wit, on the 5th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears to following entry, to wit:

170 UNITED STATES DISTRICT COURT.
(Caption—48-Cr.-360)

ORDER.

This Matter coming on to be heard upon motion of the defendants that Willis L. Hotchkiss be found guilty of contempt of this Court, by reason of his refusal to produce certain books, papers, documents and objects in his custody, pursuant to a subpoena duces tecum directing their production, and by reason of his refusal to comply with the order of this Court entered herein on November 7, 1949;

And said Willis L. Hotchkiss having filed herein his affidavit, in and by which affidavit he has stated that he declines to produce any of the said books, papers, documents or other objects designated in the said subpoena;

And said Willis L. Hotchkiss having persisted in said refusal by statements made by him in open Court;

The Court having considered the premises and the motion filed with respect thereto by the defendants, and having heard the arguments of counsel, and being fully advised in the premises, Finds said Willis L. Hotchkiss guilty of contempt of this Court in refusing to produce the books, papers, documents an dobjects designated in the subpoena duces tecum and in refusing to comply with the order of this Court entered in the above entitled cause on
171 November 7, 1949.

It Is Ordered And Adjudged that the said Willis L. Hotchkiss be, and he is hereby, committed to the custody of the Attorney General, or his authorized representative, to be held by the said Attorney General until said Willis L. Hotchkiss shall obey the order of this Court and shall comply with the provisions of the said subpoena duces tecum and said order entered on November 7, 1949, or until he shall be discharged from such custody by due process of law.

It Is Further Ordered that the United States Marshal take the said Willis L. Hotchkiss into custody forthwith.

Enter:

John P. Barnes,
Judge.

Dated: January 5, 1950.

172 And on the same day, to wit, the 5th day of January, 1950 came Willis L. Hotchkiss, Special Assistant To The Attorney General, pro se and by his Attorney, and filed in the Clerk's office of said Court his certain Notice Of Appeal in words and figures following, to wit:

173 UNITED STATES DISTRICT COURT.

Northern District of Illinois,

Eastern Division.

United States of America, *vs.* Bowman Dairy Company, et al.	Criminal Case No. 48 Cr. 360.

NOTICE OF APPEAL.

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, attorney for Willis L. Hotchkiss, Special Assistant to the Attorney General, and the said Willis L. Hotchkiss, pro se, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the judgment and Order entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, on the 5th day of January, 1950, holding Willis L. Hotchkiss, Special Assistant to the Attorney General, in contempt and committing him to the custody of the United States Marshal for refusing to produce for the defendants in this cause certain books, papers, and documents designated in a subpoena served upon the said Willis L. Hotchkiss.

Otto Kerner, Jr.,
United States Attorney.

Willis L. Hotchkiss,
Special Assistant to the Attorney General.

Filed:

(Certificate of Mailing Attached Hereto):

174 United States of America,
Northern District of Illinois. } ss.

Certificate of Mailing.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on January 6, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to: Mayer, Meyer, Austrian and Platt, 231 South La Salle Street, Chicago 4, Illinois; Campbell, Clithero & Fisher, C. L. Fisher, 1 North La Salle Street, Chicago 2, Illinois; Edwin Clark Davis & Joseph A. Greaves, 221 North La Salle Street, Chicago 1, Illinois; William R. Boruszak, Packard, Barnes, Schumacher, Gilmore & Van Ness, 38 South Dearborn Street, Chicago 3, Illinois; Howard Neitzert & Lloyd S. McClelland, Sidley, Austin Burgess & Harper, 11 South La Salle Street, Chicago 3, Illinois; Louis E. Hart & Edward Hart, Jr., 120 South La Salle Street, Chicago 3, Illinois; Leo F. Tierney & Donald M. Graham, 231 South La Salle Street, Chicago 4, Illinois; Isadore & Herbert B. Fried, 111 West Monroe Street, Chicago, Illinois; Charles M. Schaub, 139 North Clark Street, Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois. this 6th day of January, 1950.

Roy H. Johnson,
Clerk.

By Gizella Butcher,
Deputy Clerk.

(Seal)

175 And on the same day, to wit, the 5th day of January, 1950 there was filed in the Clerk's office of said Court a certain Certified Copy Of An Order Entered January 5, 1950, By The Honorable J. Earl Major, Chief Judge, United States Court Of Appeals, For the Seventh Circuit, in words and figures following, to wit:

176 UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

January 5, 1950.

Before

J. Earl Major, Chief Judge.

No. 10,080.

United States of America, *vs.* Bowman Dairy Company, et al.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Appeal of: Willis L. Hotchkiss.

On application of counsel for the appellant, Willis L. Hotchkiss, it is ordered that the said appellant be admitted to bail until the further order of this Court, upon the filing in this Court of a good and sufficient bond in the amount of $1,000.00 and released upon his own recognizance.

It is further ordered by the Court that the bail bond of appellant, Willis L. Hotchkiss, filed this day in this cause be, and the same is hereby, approved.

/s/ J. Earl Major.

A True Copy.

Teste.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

177 And afterwards on, to wit, the 13th day of January, 1950 came the Appellant, pro se and by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points Relied Upon On Appeal in words and figures following, to wit:

178 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

STATEMENT OF POINTS RELIED UPON ON APPEAL.

Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, attorney for the appellant, Willis L. Hotchkiss, and the said Willis L. Hotchkiss pro se, will rely upon the following points on appeal:

1. The subpoena duces tecum under Rule 17(c) of the Rules of Criminal Procedure, served November 1, 1949, although nominally directed against Otto Kerner, Jr. and appellant, Willis L. Hotchkiss, is in substance directed against the sovereign.

2. The sovereign is not a "person" as such word is used in Rule 17(c) of the Rules of Criminal Procedure or in Section 1, U. S. C. 1.

3. The appellant is an attorney for the Government within the meaning of Rule 54(c) of the Federal Rules of Criminal Procedure.

4. On attorney for the Government is an agent of the sovereign, and as such is not "a person" as such word is used in Rule 17(c) of the Federal Rules of Criminal Procedure or in Section 1, U. S. C. 1.

5. A subpoena for the production of books, papers, documents, and other objects may not properly, under Rule 17(c) of the Federal Rules of Criminal Procedure, issue against the Government or an attorney for the Gov-

179 ernment.

6. The right of defendants in criminal proceedings to obtain access to books, papers, documents, or objects in the custody of attorneys for the Government is governed by the Federal Rules of Criminal Procedure and is limited, under such Rules, to the rights granted to such defendants by Rule 16 of the Federal Rules of Criminal Procedure, and the application of such rule exhausts such rights of the defendants.

7. Access by the defendants and their attorneys to the

books, papers, documents, and objects designated in the subpoena served upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and the appellant, November 1, 1949, could not lawfully have been secured under Rule 16.

8. The subpoena served November 1, 1949, at the instance of the defendants upon Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, appellant here, was without legal sanction and effect under Rule 17(c) of the Federal Rules of Criminal Procedure.

9. The United States District Court erred in entering the order of November 7, 1949, directing Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and Willis L. Hotchkiss, Special Assistant to the Attorney General, to produce, for inspection and copying by the defendants and their attorneys, books, papers, documents, and objects designated in the subpoena duces tecum issued under Rule 17(c) of the Federal Rules of Crim-
180 inal Procedure against such attorneys for the Government.

10. The appellant, Willis L. Hotchkiss, not being a "person" within the meaning of Rule 17(c), acted lawfully in refusing, on instructions of the Attorney General, to comply with the order of the United States District Court directing appellant to make available to the defendants and their attorneys, for inspection and copying, the books, papers, documents, and objects designated in the subpoena duces tecum served upon the said appellant November 1, 1949.

11. The United States District Court erred in punishing the appellant as in contempt for refusing to comply with the order of the said Court directing appellant to make available to the defendants and their attorneys, for inspection and copying, the books, papers, documents, and objects in his custody designated in the subpoena duces tecum served upon such appellant November 1, 1949.

12. Under the constitutional doctrine of separation of powers, the judicial branch of the Government is without power or authority over the books, records, papers, and objects of the executive branch.

Willis L. Hotchkiss,
Appellant pro se.

Otto Kerner, Jr.,
United States Attorney.

Dated: January 13, 1950.

181 And on the same day to wit, the 13th day of January, 1950 came the Appellant, pro se and by his attorneys and filed in the Clerk's office of said Court his certain Designation Of Contents Of Record On Appeal in words and figures following, to wit:

182 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

The Clerk is hereby directed to prepare certified copies of the following, for transmittal to the United States Court of Appeals for the Seventh Circuit, as the record on appeal:

1. Indictments filed July 30, 1948.

2. Several motions for a subpoena duces tecum in accordance with Rule 17(c) of the Federal Rules of Criminal Procedure, filed June 13, 1949, by all defendants, to wit:

(a) By American Processing and Sales Company;

(b) By Beloit Dairy Company and S. D. McGuire;

(c) By The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha;

(d) By Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck;

(e) By Capitol Dairy Company and Hyman I. Freed;

(f) By Hunding Dairy Company, Western United Dairy Company, and William Boruszak;

(g) By Meadowmoor Dairies, Inc.

3. Several motions for discovery and inspection in accordance with Rule 16 of the Federal Rules of Crim-

183 inal Procedure, filed June 13, 1949, by all defendants, to wit:

(a) By American Processing and Sales Company;

(b) By Beloit Dairy Company and S. D. McGuire;

(c) By The Borden Company, H. H. Inglehart, O. N. Koenig, and O. O. Smaha;

(d) By Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck;

(e) By Capitol Dairy Company and Hyman I. Freed;

(f) By Hunding Dairy Company, Western United Dairy Company, and William Boruszak;

(g) By Meadowmoor Dairies, Inc.

4. Order that several motions of all defendants for discovery under Rule 16 and for a subpoena duces tecum under Rule 17(c) is granted and draft order be prepared, entered October 24, 1949.

5. Subpoena duces tecum directed to Otto Kerner, Jr. and Willis L. Hotchkiss for production of documents, together with affidavit of service of subpoena on Willis L. Hotchkiss, filed November 1, 1949.

6. Order on stipulation that defendants' motions to settle orders in connection with defendants' motions under Rules 16 and 17(c) be set for hearing on November 7, 1949, entered November 2, 1949.

7. Order that Government produce on November 15, 1949, and defendants proceed to inspect and copy documents specified in subpoena duces tecum served November 1, 1949, entered November 7, 1949.

8. Order on stipulation that order dated November 7, 1949, directing Otto Kerner, Jr. and Willis L. Hotchkiss to produce certain books, papers, and documents des-
184 ignated in subpoena duces tecum is amended by changing the return date from November 15, 1949, to November 28, 1949, entered November 14, 1949.

9. Motion by Government to quash subpoena duces tecum served on November 1, 1949, and to set aside order entered on November 7, 1949, filed November 28, 1949.

10. Order, by agreement, that further arguments and briefs are waived and Government's motion to quash subpoena taken under consideration, entered November 28, 1949.

11. Memorandum opinion of the District Court that Government's motion to quash the subpoena issued November 1, 1949, and to set aside the order entered on November 7, 1949 be denied, filed December 27, 1949.

12. Order that motion of the United States to quash the subpoena duces tecum served upon Willis L. Hotchkiss is denied, entered January 4, 1950.

13. Sworn statement of Willis L. Hotchkiss, refusing to comply with the subpoena duces tecum served upon him November 1, 1949 and to comply with the order of November 7, 1949, filed January 4, 1950.

14. Motion of the defendants for an appropriate order for the refusal of Willis L. Hotchkiss to comply with the subpoena duces tecum served upon him November 1, 1949,

together with exhibits A, B, C, D, E, and F attached thereto, filed January 4, 1950.

15. Order on defendants' motion that Willis L. Hotchkiss be held in contempt of court; that hearing be continued to January 5, 1950 for entry of order adjudging said Willis L. Hotchkiss in contempt.

16. Order finding Willis L. Hotchkiss guilty of contempt of court, committing the said Willis L. Hotch-
185 kiss to the custody of the Attorney General, and ordering the United States Marshal to take him into custody, entered January 5, 1950.

17. Notice of appeal of Willis L. Hotchkiss to the United States Court of Appeals for the Seventh Circuit, and proof of service thereof.

18. Order of the Senior Judge of the Court of Appeals for the Seventh Circuit releasing appellant, Willis L. Hotchkiss, from custody on his own recognizance, filed January 5, 1950.

19. Transcript of proceedings had on November 7, 1949; transcript of proceedings had on January 4, 1950; and transcript of proceedings had on January 5, 1950.

20. All docket entries in this above numbered case.

21. Statement of points relied upon on appeal, filed January 13, 1950.

22. This, appellant's designation of contents of record on appeal.

Willis L. Hotchkiss,
Appellant pro se.

Otto Kerner, Jr.,
United States Attorney.

Dated: January 13, 1950.

186 And afterwards on, to wit, the 20th day of January, 1950 came the Appellees by their attorneys and filed in the Clerk's office of said Court their certain Designation Of Additional Portions Of Record, Proceedings, And Evidence To Be Included On Appeal in words and figures following, to wit:

187 UNITED STATES DISTRICT COURT.

* * (Caption—48-Cr.-360) * *

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE INCLUDED ON APPEAL.

The Clerk is hereby directed to prepare certified copies of the following for transmittal to the United States Court of Appeals for the Seventh Circuit as the record on appeal:

1. Order that Government produce on November 15, 1949, and defendants proceed to inspect and copy documents received by the Government in response to the several Grand Jury Subpoenas Duces Tecum listed on Exhibit A thereto attached which by reference was made a part thereof, entered November 7, 1949.

2. Order impounding documents received under Subpoenas issued and to be issued in the custody of Melville C. Williams, Chief of the Midwest Office, Anti-Trust Division, Department of Justice, and his successors, entered in Grand Jury Proceedings No. 8949 which Grand
188 Jury returned the indictment in this cause, entered September 17, 1947.

3. Appellees' additional designation of contents of record on appeal.

Louis E. Hart,
L. Edward Hart, Jr.,
Leo F. Tierney,
Donald M. Graham,
Attorneys for Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr. and D. Cameron Peck.

Herman A. Fischer,
Carlton L. Fischer,
Attorneys for American Processing & Sales Company.

Leo F. Tierney,
Donald M. Graham,
Attorneys for Beloit Dairy Company and S. D. McGuire.

Howard Neitzert,
Edwin Clark Davis,
Walter J. Cummings, Jr.,
Joseph A. Greaves,
Attorneys for The Borden Company, O. O. Smaha, O. N. Koenig and H. H. Inglehart.

Isidore Fried,
Herbert B. Fried,
Attorneys for Capitol Dairy Company and Hyman I. Freed.

Thomas B. Gilmore,
Attorney for Hunding Dairy Company, Western United Dairy Company and William R. Boruszak.

Charles W. Schaub,
Attorney for Meadowmoor Dairies, Inc.

Dated: January 20, 1950.

189 UNITED STATES DISTRICT COURT.
(Caption—48-Cr.-360)

PROOF OF SERVICE.

Received this 20th day of January, 1950, a copy of Appellees' Designation of Additional Portions of Record, Proceedings and Evidence to be Included on Appeal.

Otto Kerner, Jr.,
United States Attorney,
Willis L. Hotchkiss,
Appellant pro se.

190 And, to wit, on the 17th day of September, 1947, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in Grand Jury Proceedings, No. 8949, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

191 *In the Examination of Matters Before the Special Grand Jury to Be Impaneled in the Northern District of Illinois on September 22, 1947.*

Grand Jury No. 8949.

ORDER GRANTING APPLICATION TO IMPOUND DOCUMENTS.

Upon the application of Willis L. Hotchkiss, Special Assistant to the Attorney General:

It Is Ordered that all documents produced or to be produced pursuant to the terms of the subpoena duces tecum heretofore issued herein be impounded in the custody of Melville C. Williams, Chief of the Chicago Office, Antitrust Division, Department of Justice, 208 South La Salle Street, Chicago 4, Illinois, and his successors, excepting those documents voluntarily deposited with Government counsel by the witnesses so subpoenaed, and also excepting therefrom, all such documents as Government counsel determine may not be necessary to be presented to the grand jury and are returned to the witnesses.

The witnesses producing documents, together with their counsel, upon making reasonable arrangements with Government counsel, shall have access to those documents produced by them.

This order relates specifically to the subpoena duces tecum issued and to be issued and the production of documents to be presented to the grand jury to be impaneled in the Northern District of Illinois on September 22, 1947, which grand jury proceedings are numbered 8949.

Such documents as may become impounded hereunder shall be retained in the custody of said Melville C.
192 Williams, Chief of the Chicago Office, Antitrust Division, Department of Justice, and his successors, pur-

suant to the terms of this order, and shall not be released to any of the witnesses or their counsel without approval of Government counsel, or until the further order of this Court.

Enter:

Barnes,
Judge.

Dated: September 17, 1947.

193 48 Cr. 360—U. S. A. *vs.* Bowman Dairy Company et al. The following are the Docket Entries.

CRIMINAL DOCKET

JUDGE BARNES

CALENDAR

38 CR 360

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. BOWMAN DAIRY COMPANY; AMERICAN PROCESSING AND SALES COMPANY; BELOIT DAIRY COMPANY; THE BORDEN COMPANY; CAPITOL DAIRY COMPANY; HUDDING DAIRY COMPANY; MEADOW-MOOR DAIRIES, INC.; WESTERN UNITED DAIRY CO.; WILLIAM R. BORUSZAK; HYMAN I. FREED; H. H. INGLEHART; WALTER F. KETTELL; O. N. KOENIG; FRANCIS H. KULLMAN, JR.; S. D. McGUIRE; D. CAMERON PECK; and O. O. SWAHA, Defendants.	For U. S.: Otto Kerner, Jr. U.S.Atty. Willis L. Kerchkoff, Spec'l Ass't to Atty General 525 - 208 S. LaSalle St Chgo 4 For Defendant: see list for attorneys

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
7-30-48	VIOLATION OF SECTION ONE OF THE ACT OF JULY 2, 1890 (U.S.C., TITLE 15, SEC. 1.)		

48 D 60

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
7-30-48	Filed Indictment. (9) (JSC)	1500	
" " "	Issued 17 summons and copies with copies of indictment.		
" " "	Order to issue summons for each corporation; to issue summons for each individual defendant and to fix bonds at $1000. each, and that summons as to each defendant be returnable Monday, September 13, 1948.		
8-11-48	Filed Summons returned executed as to E.H. Inglehart $2.54		
8-11-48	Filed Summons returned executed as to Hyman I. Freed $2.90		
8-11-48	Filed Summons returned executed as to American Processing and Sales Co. $2.00		
8-11-48	Filed Summons returned executed as to Western United Dairy $2.00		
8-11-48	Filed Summons returned executed as to Meadowmoor Dairies Inc. $2.35		
8-13-48	Filed Summons returned executed as to Beloit Dairy Co. $2.78		
8-13-48	Filed Summons returned executed as to Bowman Dairy Co. $2.00		
8-20-48	Filed Summons returned executed as to S.S. McClure		
8-20-48	Filed summons retd executed as to Hundley Dairy Co		
8-20-48	Filed summons retd executed as to Capitol Dairy Co		
9-3-48	Order that portion of order entd July. , 48 , requiring bond, vacated Draft - LaBuy, J (Mailed notice 9-7-48 (		
9-13-48	Filed 14 appearances -see list		
9-13-48	Filed (2) Consent Pursuant To Rule 42 -O.O.Smaha, O.N.Koenig and E.H.Inglehart		
9-13-48	Filed summons retd served on O.N.Koenig, Walter F. Kettell, The Borden Dairy Co, Francis H. Kullman, Jr. and D. Cameron Peck - Service 10.55		
9-13-48	Filed summons retd not found as to Smaha		
9-20-48	Filed Notice (Bowman Dairy Co et al		
9-20-48	Filed Notice and Proof Of Service (U.S.)		
9-20-48	On mo of Govt and defts order deft to file mot to dismiss indictment and supporting briefs within 20 days Govt. to file answering briefs within 15 days from date, defts to file reply brief 10 days from date, mot on said mos set for Feb 7,1949 and arraignment and plea contd generally pending dispn of said motions -Barnes, J. Mailed notice 9-21-48		
9-21-48	Filed summons retd not found as to Bornemak		
12-20-48	Filed Notice and Motion To Dismiss Indictment of Capitol Dairy Company and Hyman I. Freed		
12-20-48	Filed Motion and copy of Meadowmoor Dairy, Inc. To Dismiss Indictment and Receipt		
12-20-48	Filed Additional Brief and copy of Meadowmoor Dairies, Inc. and Receipt		

CIVIL DOCKET 48 CR 360

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT RECEIVED IN ENRICHMENT RETURNS
12-20-48	Filed Notice and Motion To Dismiss The Indictment Of American Processing and Sales Company			
12-20-48	Filed Notice and Motion To Dismiss The Indictment of Bowman Dairy Co. Walter F. Kettell, Francis H. Kullman, Jr. and D. Cameron Peck			
12-20-48	Filed Motion Of Defendants, Beloit Dairy Company and S. D. McGuire to Dismiss Indictment and Proof Of Service			
12-20-48	Filed Motion Of Defendants Hunding Dairy Company, Western United Dairy Company and William Borusczek to Dismiss The Indictment			
12-20-48	Filed Motions of The Borden Company, H.H. Inglehart, O.N.Koenig and O.O. Smaha To Dismiss Indictment and Notice Of Filing and Proof Of Service			
12-20-48	Filed Brief Of Defendants In Support Of Motions To Dismiss The Indictment and 2 copies			
1-10-49	Filed Government's Brief in Opposition To Defendant's Motions to Dismiss The Indictment			
1-10-49	Filed 2 Proofs of Service d			
1-25-49	Fld addtl reply brf of Deft Meadowmoor Dairies, Inc.(5) brs.			
1-25-49	Filed Notice			
1-25-49	Filed 2 Reply Briefs of Defendants In Support Of Motions To Dismiss The Indictment			
1-25-49	Filed Notice Of Filing and Proof Of Service			
2-7-49	On Court's motion order hearing on defendants' motion to dismiss indictment contd to Feb 8, 1949 at 10:00 A.M. Barnes, J			
	Mailed notice 2-7-49 d			
2-8-49	On motion defts order hrg on defts' motion to dismiss indictment contd to Feb 14, 1949 at head of call - Barnes, J			
	Mailed notice 2-8-49 d			
2-11-49	On Court's motion order hrg on defts' motion to dismiss indictment contd from Feb 14, 1949 to Feb 15, 1949 at 10: A.M. - Barnes, J			
	Mailed notice 2-11-49 d			
2-21-49	Argts hrd and concluded Order deft's motion to dismiss indictment taken on argts and on briefs heretofore filed Barnes, J			
	Mailed notice 2-21-49 d			

D. C. 110

48 CR 350

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
2-24-49	Filed Transcript of Proceedings had before Judge Barnes 2-21-49			
3-15-49	Filed Request For Additional Briefs			
3-28-49	Fld defts' addtl memo. (6)hms			
4-6-49	Filed Memorandum of Judge Barnes			
4-13-49	Filed Notice and Proof of Service			
4-13-49	Order defts' motion to dismiss [illegible] over [illegible] Docket -Draft [illegible] J			
4-13-49	Filed Motion of Defendant [illegible] To Enlarge Time In Which To File Motions For Bills Of Particulars, Motions For Discovery and Inspection, and Other Preliminary Motions and For Continuance Of Arraignment And Trial Until Determination Of Said Motions -and Notice of Filing & Proof of Service- Bowman Dairy Co. et al			
4-13-49	Order defts given 60 days to file motions for bill of particulars etc. with [illegible] contd generally pending disp of said motions [illegible] -			
	Mailed [illegible]			
6-13-49	Filed Motion For Bill Of Particulars and Brief In Support Thereof, Motion To Strike Surplusage From The Indictment and Brief In Support Thereof, Motion For Discovery And Inspection In Accordance with Rule 16 Of The Federal Rules of Criminal Procedure and Brief In Support Thereof and Motion For A Subpoena In Accordance with Rule 17 (c) Of The Federal Rules Of Criminal Procedure and Brief in Support Thereof by American Processing And Sales Company			
6-13-49	Filed Motion Of Defendants Beloit Dairy Company and S.D. McGuire for Bill of Particulars, Motion To Strike Surplusage From The Indictment, Motion For Discovery And Inspection In Accordance Wit Rule 16 of the Federal Rules Of Criminal Procedure, Motion For A Subpoena In Accordance With Rule 17 (c) Of The Federal Rules Of Criminal Procedure and Proof Of Service			
6-13-49	Filed Briefs Covering all of the above motions			
6-13-49	Filed Motion Of The Borden Company And Certain Other Defendants For A Bill of Particulars, A Copy, Motion To Strike Surplusage From The Indictment A copy, Motion For			

CAUSE NO. 48 CR 360 RE:

DATE	PROCEEDINGS
6-13-49 contd	Discovery And Inspection In Accordance With Rule 16 Of The Federal Rules Of Criminal Procedure & copy, and Motion For A Subpoena In Accordance With Rule 17 (c) Of The Federal Rules Of Criminal Procedure & copy
6-13-49	Filed Briefs Of the Borden Company and Certain Other Defts covering the above motions
6-13-49	Filed Notice and Motions For A Bill of Particulars, To Strike Surplusage From The Indictment, For Discovery And Inspection and For a Subpoena Duces Tecum, with copies attached of Bowman Dairy Co, Walter F. Kettell, Francis H. Kullman Jr and D. Cameron Peck
6-13-49	Filed Briefs covering the above motions by Bowman Dairy Co and other defts.
6-13-49	Filed Motions For Bill of Particulars, To Strike Surplusage From The Indictment, For Discovery And Inspection and For Subpoena Duces Tecum of the Capitol Dairy Company and Hyman I. Fried
6-13-49	Filed Briefs of Capitol Dairy Co. and Hyman I. Fried in support of said motions
6-13-49	Filed Motions For Bill of Particulars, To Strike Surplusage From The Indictment, Motion For A Subpoena in accordance With Rule 16 and Motion For A Subpoena in accordance with Rule 17 (c) of Criminal Procedure of Hunding Dairy Company, Western United Dairy Company and William A. Boruszak
6-13-49	Filed Briefs of the above named defts in support of said motions
6-13-49	Filed Motions for Supplemental Bill Of Particulars, To Strike Surplusage From The Indictment, For Discovery and Inspection and For Subpoena in accordance with Rule 17 (c) by Meadowmoore Dairies Inc.
6-13-49	Filed Briefs in support of said motions
6-17-49	Filed Stipulation Extending Time For Filing Briefs
" " "	On stip ord time for Govt to file answering briefs in opposition to motions filed by defts extd to July 15, 1949 and time for defts to file reply extd to Aug. 15, 1949 Draft- Barnes, J
	Mailed notices 6-20-49
7-15-49	Filed brief of the Government in oppo to defts' several mots for bills of parts, discovery, subpoenas, and to strike surplusage. (2) (27) bms
~~7-22-49~~	~~Fld. Notc. & Prf. Serv. Govt's. Brf.~~ ERROR ~~(5)~~
7-22-49	Fld. Notc. & Prf. Serv. Govt's. Brf. (5) r
8-15-49	Fld. Note. & Mo. for Oral Argt. on Motions. (2)(1) r

D. C. 114

CAUSE NO 48 CR 360 RE:

DATE	PROCEEDINGS
8-15-49	Filed Memorandum Of Defendants In Reply To Govt's Brief In Opposition To Defendants' Several Motions For Discovery And Inspection Bill Of Particulars, Subpoena Under Rule 17 (c) And To Strike Surplusage
9-9-49	Order defts' motions for bill of particulars, etc., et for hrg on Sept. 26, 1949 Draft- Barnes, J
	Mld ntcs 9-9-49 d
9-23-49	On Court's motion order hrg on defts' motion for bill of particulars etc. contd from Sept. 26, 19 to Oct. 10, 19 9 at 10:00 A.M. Barnes, J
	Mld ntcs 9-23-49 d
10-6-49	On Court's motion ord hrg on defts' motions for bill of particulars etc contd from Oct 10, 19 to Oct 19 9 at 10: A.M. -Barnes, J
	Mld ntcs 10- -49 d
10-26-49	Filed Transcript of Proceedings before Judge Barnes
11-1-49	Filed Affidavit of Service of Subpoena d
11-2-49	Filed Stipulation
11-2-49	On stip ord defts' motions to settle ords in connection with defts' Motions in connection with defts' motions under Rule 16 and Rule 17 (c) set for hrg on Nov 7, 19 9 at 10:00 A.M. - Barnes, J
	Mld ntcs 11-2-49 d
11-3-49	Filed Affidavit Of Service Of Subpoena d
10-24-49	Argts hrd and concluded The Court decides defts' motions for discovery under Rule 16 and for a sub under Rule 17 C orally from the bench, and counsel directed to prepare and present within a short date and upon notice a draft order consistent with the views expressed. Order defts' motions to strike surplusage and for bill of particulars taken on brief and argmts - Barnes, J
11-7-49	Enter order directing Govt to perm t defts to inspect etc. certain documents etc Draft Enter order directing Govt to produce certain documents designated in a certain subpoena etc Draft - Barnes, J
	Mld ntcs 11-7-49 d
11-14-49	Filed Stipulation
11-14-49	Order on stipulation amending order of November 7, 1949 by changing return date in subpoena to November 28, 1949 Draft- Barnes, J
11-28-49	Filed Notice and Motion To Quash Subpoena and Proof Of Service
11-28-49	By agreement order further argmts and further briefs waived and Govt's motion to quash subpoena issued under Rule 17 (c) and to set aside order of May 7, 19 9 taken by the Court -Barnes, J
	Mld ntcs 11-28-49

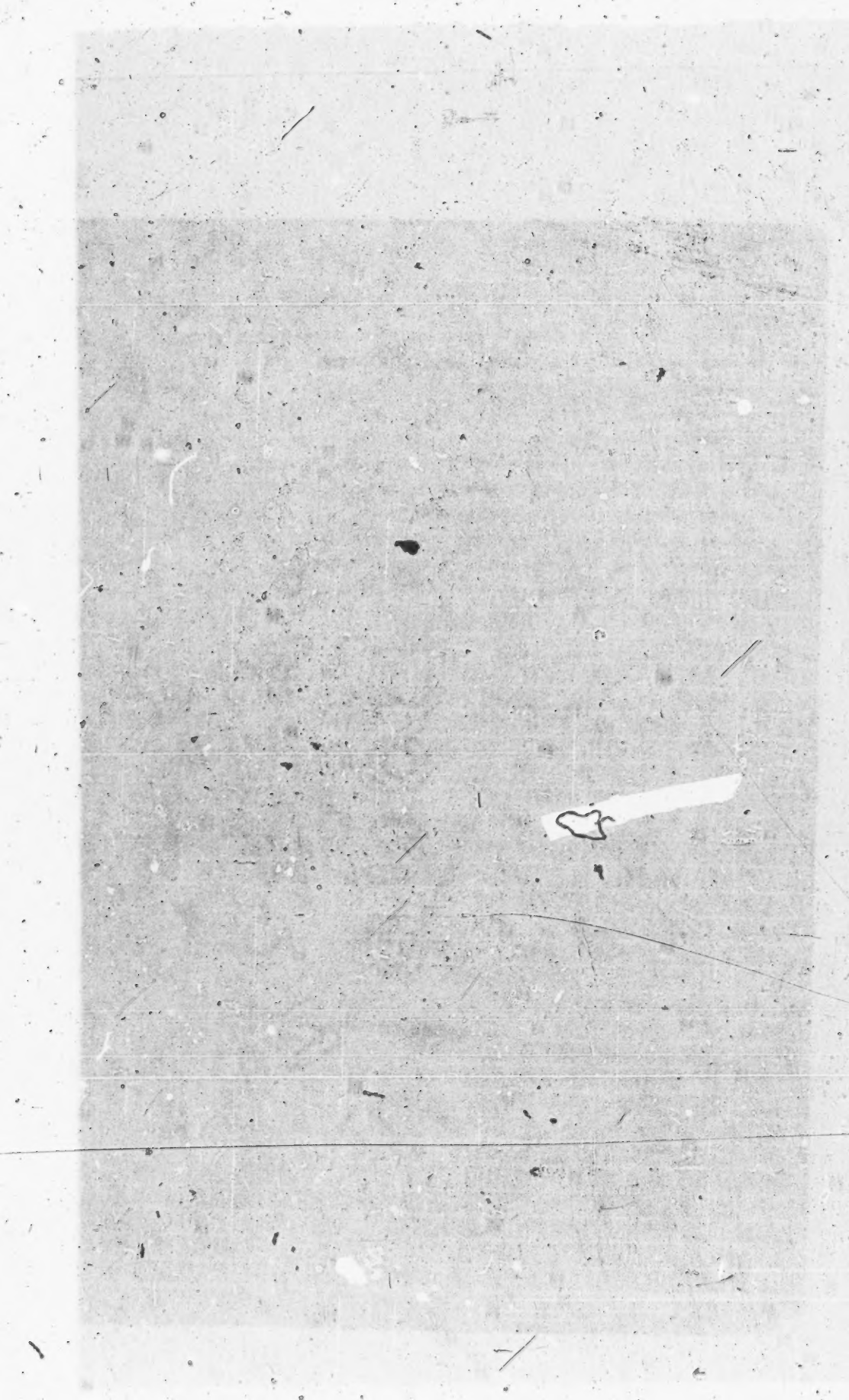
CIVIL DOCKET

DATE	PROCEEDINGS
12-[illegible]-49	Filed Transcript of Proceedings of [illegible] Nov. 7, 1949
[illegible]	Filed [illegible]
1-4-50	Ord several motions ... dtc to strike surplusage from indictment allowed exc Swaft
	Ord mot of Govt filed on Nov [illegible], 19[illegible] to quash [illegible] certain Subpoena Duces Tecum, denied Swaft
	Order several motions of defts for Bill of Particulars [illegible] granted in part and denied in part, etc Swaft-Barnes, J.
	Mld ntce 1-4-50
1-4-50	Filed Motion To Enter An Appropriate Order With Respect To The Refusal of Willis L. Hotchkiss, Special Asst To The Atty General, To Comply With A Subpoena Duces Tecum And With An Order Of This Court Entered Herein On Nov. 7, 1949 And Affidavit
1-4-50	Filed Statement Of Willis L. Hotchkiss, Special Asst to The Attorney General, Refusing To Comply With Order Of Nov. 7, 1949 and Subpoena
1-4-50	Ord deft's motion that Willis L. Hotchkiss, Special Asst to Atty General be held in contempt of Court entered. Hearing held and contd to Jan 5, 1950 at 10:00 A.M. for the entry of an order adjudging said Willis L. Hotchkiss in contempt of Court - Barnes, J.
1-5-50	Order Willis L. Hotchkiss Special Asst To The Atty General committed to the custody of the Atty General until said Willis L. Hotchkiss shall obey certain orders of this Court etc. Ord that Warshal to take said Willis L. Hotchkiss into custody. Entered - Barnes, J.
1-5-50	Filed Notice of Appeal
1-5-50	Issued certified copies of Order of 1/5/50 to Judge Barnes to Otto Kerner Jr
1-5-50	Filed certified copy of Order from U.S.C.A. signed by Judge J. Earl Major allowing deft to bail in amt of $1000. and releasing deft Hotchkiss on his own recognizance in amt of $1000.
	Mld ntce 1-5-50
1-10-50	Filed Transcript of Proceedings before Judge Barnes on Jan 4 and Jan 5, 1950

Form No. 110

48 CR 360

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
1-10-50	Issued commitment and copy for Hotchkiss to Marshal d			
1-13-50	Filed Appellant's Designation Of Contents Of Record On Appeal			
1-13-50	Filed Statement Of Points Relied Upon On Appeal and Proof of Service d			
1-20-50	Filed Designation Of Additional Portions Of Record, Proceedings and Evidence To Be Included On Appeal d			
2-2-50	Filed Stipulation Extending Time for Filing Bill of Particulars			
2-2-50	On stipulation ord time for Govt to file its Bill of particulars ext to March 3, 1950 - Draft - Barnes, J Mld ntcs 2-2-50			



203 United States of America,
Northern District of Illinois. } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Appellant's Designation and Appellees Additional Designation filed in this Court in the cause entitled: United States of America, Plaintiff, *vs.* Bowman Dairy Company, et al., Defendants, No. 48 Cr. 360, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 10th day of February, 1950.

Roy H. Johnson,
Clerk,
By Gizella Butcher,
Deputy Clerk.

(Seal)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record filed April 19, 1950, in:

Cause No. 10080.

The United States of America,
Plaintiff,

vs.

Bowman Dairy Company, *et al.*,
Defendants,

and

Willis L. Hotchkiss.
Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of November, A. D. 1950.

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand, nine hundred and fifty, and of our Independence the one hundred seventy-fifth.

The United States of America, *Plaintiff*, 10080 *vs.* Bowman Dairy Company, *et al.*, *Defendants*, and Willis L. Hotchkiss, *Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterward, to-wit, on the twentieth day of September, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, September 20, 1950.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

The United States of America, *Plaintiff*, 10080 *vs.* Bowman Dairy Company, *et al.*, *Defendants*, (Willis L. Hotchkiss, Appellant.)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel and on oral argument by Mr. L. Roger Wollenberg, counsel for appellant, and by Mr. L. Edward Hart, Jr., and Mr. Walter J. Cummings, Jr., counsel for the appellees, and the Court takes this matter under advisement.

And afterward, to-wit, on the seventh day of November, 1950, there was filed in the office of the Clerk of this Court the opinion of the Court, which opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10080 October Term and Session, 1950.

United States, *Plaintiffs,*
vs.
Bowman Dairy Company, *et al., Defendants,*
(Willis L. Hotchkiss, Appellant.)

Appeal from the U. S. District Court for the Northern District of Illinois, Eastern Division.

November 7, 1950.

Before MAJOR, *Chief Judge*, DUFFY and LINDLEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* The indictment herein charged eight corporations, all engaged in the milk business, and nine officers of such corporations with violation of Sec. 1 of the Sherman Act (15 U. S. C. A., Sec. 1), by conspiring to allocate, among such corporations, wholesale fluid milk customers in the Chicago area, and also to allocate the sales of fluid milk to certain public institutions located in said area.

The various defendants moved to dismiss the indictment, which motions were denied. Thereafter defendants moved for a bill of particulars, for discovery under Rule 16, and for a subpoena duces tecum under Rule 17(c), Federal rules of Criminal Procedure.[1] The government

1. Rule 16. *Discovery and inspection.* Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from

did not object to the motion under Rule 16, which requested an order directing the attorney for the government to produce for defendants' inspection the documents, books and papers which the government had obtained from the defendants and other persons by seizure or process. The motion under Rule 17(c), to which objection was made, was for an order requiring Willis L. Hotchkiss, special assistant to the Attorney General and chief of the midwest office of the Anti-Trust Division of the United States Department of Justice, to produce documents, books and papers obtained by the government by means other that seizure or process.

The district court entered an order directing the attorney for the government to produce for defendants' inspection, books, papers and documents designated in a subpoena duces tecum, which defendants had theretofore served and filed. The subpoena directed Mr. Hotchkiss to produce—

> "* * * all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial

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others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. *Subpoena.*

(a) *For attendance of witnesses; form; issuance.* A subpoena shall be issued by the clerk * * * and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. * * *

(c) *For production of documentary evidence and of objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

The government's motions to quash the subpoena issued under Rule 17(c) and to set aside the order which directed compliance with the subpoena were denied. The grounds stated in the motion to quash were: (a) under Rule 17(c), Federal Rules of Criminal Procedure, a subpoena for the production of documents may not issue against an attorney for the government; (b) the court has no jurisdiction to order the attorney for the government to produce for inspection by the defendants the documents and other papers designated in a subpoena issued under Rule 17(c); and (c) the rights of defendants in criminal proceedings to obtain access to documents and other papers in the custody of attorneys for the government, as such term is defined in Rule 54(c) of the Federal Rules of Criminal Procedure, are limited to the rights granted to such defendants by Rule 16, Federal Rules of Criminal Procedure, and the application of such Rule 16 exhausts the rights of the defendants to secure access to such books, records and documents or other objects in the custody of an attorney for the government. Objection was also made that the subpoena called for the production of privileged documents, including among others documents which the government might have secured from confidential and voluntary informants and that the disclosure of such documents to defendants would be against public policy.

Hotchkiss submitted to the court a written statement in the form of an affidavit, which averred that all of the documents which the court had ordered produced were in his custody. After summarizing the reasons why he claimed the court did not have jurisdiction under Rule 17(c) to enter a pre-trial discovery order against an attorney for the government, he stated that, acting on the advice and instruction of the Attorney General of the United States and the Assistant Attorney General in charge of the Anti-Trust Division, he respectfully declined to comply with the court's order. The court then entered an order find-

ing Hotchkiss guilty of contempt of court and committed him to the custody of the Attorney General, to be held until such time as he complied with the provisions of the subpoena duces tecum, or until discharged from custody by due process of law. The matter before us is Hotchkiss' appeal from the order holding him in contempt of court.

It is readily apparent that Rule 16, Federal Rules of Criminal Procedure, is restricted in its scope. A defendant in a criminal case faces sharply defined limitations in securing access to documentary material in the hands of prosecuting attorneys of the federal government. The order granting access is directed to the attorney for the government. The only documents papers, books and objects to which a defendant can have access are those obtained from or belonging to the defendant or such as were obtained from others by seizure or process. Furthermore, the defendant must make a showing (a) that the items sought may be material to his defense, and (b) that the request is reasonable.

The history of the development of Rule 16 shows that the limitations appearing therein were deliberately inserted. In May, 1943, the Advisory Committee in charge of formulating the new criminal rules released to the bench and bar of the country, for consideration and suggestion, the preliminary draft of such rules. The first predecessor to Rule 16 (Rule 19) provided broadly for discovery and inspection in this language:

> "* * * the court may order the attorney for the government to permit the inspection * * * of any designated * * * documents, * * * not privileged, * * *."

As proposed this rule was substantially identical to Rule 34 of the Federal Rules of Civil Procedure then in effect, which provided for inspecting, copying and photographing "of any designated documents, papers, books, * * * not privileged." To many members of the bench and bar who had assumed the law to be that the right of discovery was not recognized in criminal cases, the proposed rule was undoubtedly a startling innovation. See: *Shores v. United States*, 8 Cir., 174 F. 2d 838, 844. It had been stated as a recognized rule of law that at common law a defendant had no right of discovery in criminal cases. Wigmore, Evidence (3d Ed.), Sec. 1859g. In the second

preliminary draft, issued by the Advisory Committee in February 1944, the provision in the proposed rule on discovery and inspection (which in that draft was Rule 18) was narrowed to:

> "* * * designated books, * * * obtained from or belonging to the defendant or constituting evidence in the proceeding, * * *."

The finally approved rule clearly reveals the standards set in the civil discovery rule (No. 34) were rejected in favor of an entirely new standard. In the Advisory Committee's Notes to Rule 16, all reference to civil rules was omitted, and the limited nature of the provision for discovery in criminal proceedings is emphasized. The note reads:

> "Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld*, 57 F. 2d 74 (CCA-2)—cert. den., 286 U.S. 556. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 F. Supp. 523, 534 (E.D. Ill.). The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court."

Considering the history of Rule 16 which shows the evolution from the broad terms of its first draft to its final restrictive and limited terms, it is difficult to believe that the framers of the rule intended to authorize discovery and inspection of broad scope under Rule 17(c) pertaining to subpoena which was expressly prohibited by Rule 16 which is the rule intended to cover discovery and inspection. It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17(c) an almost unlimited right of discovery by use of the subpoena provisions.

In *United States* v. *Maryland & Virginia Milk Pro-*

ducers Assn., Inc., et al., 9 F.R.D. 509, the defendants endeavored to obtain a subpoena duces tecum which required the government to produce all documents which it had obtained from any person not a party to the proceeding, whether by process or not. Judge Holtzoff denied the request and it is of significance that Judge Holtzoff was a member of the Advisory Committee which drafted the criminal rules. Judge Holtzoff stated (p. 510):

> "The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.
>
> "In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purposes of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.
>
> "It is well settled that in a criminal case, unlike a civil action, such a right of broad discovery does not exist. As I said before, Rule 17(c) was not intended to be a discovery provision, but merely a means to make a subpoena duces tecum returnable prior to the trial in order that time at the trial may be saved while documents are being examined and inspected."

In *United States v. Brunfield et al.*, 85 F. Supp. 696 which was a conspiracy case, the defendant sought, under Rules 16 and 17, to have produced a voluntary statement of a co-defendant. The court said (p. 707) that Rule 17(c) "is simply complementary to Rule 16 in providing for subpoena addressed to the party having possession of the documents, to produce them." It was the holding of the court that since the document had not been obtained by seizure or process, it was beyond the reach of subpoena issued under Rule 17(c). The court did indicate that if the co-defendant were a witness at the trial, the statement might be used for impeachment purposes.

In *United States* v. *Hiss*, 9 F. R. D. 515, the defendant endeavored to obtain papers from the Commissioner of Immigration and Naturalization. The court said (p. 516):

> "To permit the subpoena and the ex parte order to

> stand would, it seems to the Court, set a precedent whereby defendants could promiscuously seek subpoenas under Rule 17(c) of the Federal Rules of Criminal Procedure * * * which the Clerk issues without question * * *."

The only case called to our attention holding to the contrary is *United States* v. *Bondy*, 171 F. 2d 642, a per curiam decision. The court there said (p. 644):

> "* * * So much of the order as directs production of the documents designated in the subpoena is authorized by Rule 17(c). * * *"

The real holding in that case was that the Court of Appeals lacked jurisdiction to entertain the mandamus petition. In spite of the language used the opinion cannot be construed as a considered determination as to the character of documents which a subpoena may include or the purposes for which it may issue.

Although the language of Rule 17(c) is broad, the rule is only one in an integrated group for the regulation of procedure in criminal cases in federal courts. It must be read with the other rules in mind, and particularly Rule 16. It should not be construed so that the carefully drawn limitations in Rule 16 become meaningless. It is our view that Rule 17(c) provides for the traditional type of trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial. However, it may not be converted into an unrestricted pre-trial discovery device.

The government's motion to quash the subpoena and to set aside the order which directed compliance therewith should have been granted. The order adjudging Willis L. Hotchkiss to be in contempt must be and hereby is

REVERSED.

MAJOR, *C. J.*, concurring. I agree with the result reached by Judge Duffy and with his reasoning, but I would go further and hold that Rule 17(c) imposes no obligation upon parties, either the defendants or the government, including their attorneys.[1] In my view, the rule is so plain and unambiguous as to leave little if any need for construc-

1. I would so hold notwithstanding what I regard as the ill-conceived admission made by counsel for the government on oral argument that the rule might apply to the government in some instances.

tion. More than that, I am unwilling to impute to the rule makers and those associated therewith, including Congress and the Supreme Court, such carelessness and indifference as is inherent in defendants' position and the argument made in its support.

In order to avoid repetition, I accept what appears to be an accurate statement of the facts as made by Judge Duffy. And I am not too much concerned with the cited authorities because they are so meager and uncertain as to furnish little if any light. In reality, the question posed is one of first impression. The pertinent and controlling language of 17(c) is the first sentence, "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein." Two words contained in this sentence, "also" and "person", are significant and I think determinative. The dictionary definition of the word "also" is, "As something further; tending in the same direction; besides; as well; in addition." (Funk and Wagnalls New Standard Dictionary of the English Language.) The word as thus defined is no different than its common, every-day meaning. The word presupposes that a previous command has been made upon the person who is directed to produce. What is this previous demand and who is the person to whom it is directed? The answer is found in 17(a), "A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed and otherwise in blank to a party requesting it, who shall fill in the blanks before it is served." Thus it is plain that under (a) a person to whom the subpoena is directed is required "to attend and give testimony," and under (c) such person may also be commanded "to produce the books, papers, documents or other objects designated therein." As Judge Duffy suggests, this is the traditional trial subpoena, and it is directed at a person in one instance to "attend and give testimony," and in the other to "also" produce the designated documents.

Evidently "person" refers to one subpoenaed as a witness and not to a party or an attorney. The theory of a party to a suit directing a subpoena to the opposite party or to an attorney is a novelty to me. The government in a criminal case and the plaintiff in a civil suit are in court

of their own volition, and the defendants in a criminal case are in court by virtue of a warrant (sometimes a summons) and in a civil suit by summons. When thus in court they are at all times subject to its orders and command, and the same is likewise true of the attorneys of record for the respective parties, and it is an anomaly to think of a party requiring an opposing party or its attorney to do something at the command of a subpoena.

Rule 17 is entitled "Subpoena," and every paragraph from (a) to (g) inclusive demonstrates that it is directed at witnesses and not to parties. Paragraphs (a) and (c) may be utilized by the parties on both sides alike and either provision is brought into operation without motion and without a court order. The sole requirement is that the clerk issue a subpoena in blank under the seal of the court to a "party requesting it," which party is required to fill in the blank by inserting the name of the person to be subpoenaed as a witness and to designate the documents which such person is required to produce. 17(b) is for the benefit of "Indigent Defendants," and provides a procedure for obtaining the attendance of witnesses without cost. Such defendant is required to "state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed." 17(d) provides for the service of a subpoena "by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law." Is it conceivable that the "person named" has reference to a party or an attorney entitled to a fee for court attendance and for mileage? 17(e) provides that a subpoena requiring the attendance "of a witness at a hearing or trial" may be served any place within the United States, and a subpoena directed to a witness in a foreign country shall be issued and served as provided by statute.

A study of the Rules of Criminal Procedure is convincing that the rule makers carefully differentiated between such words and phrases as "government" or "attorney for the government" or "defendant" or "party" or "person." The rules state with precision as to when and to whom they are applicable. Illustrative is Rule 16, entitled "Discovery and Inspection." Judge Duffy has discussed this rule and the notes of the advisory committee. I need not add to what he has shown, except to emphasize that the rule is for the benefit of a defend-

ant and can only be brought into operation by an order of court upon motion of the defendant. It is specifically directed at the "attorney for the government." And is there any reason to think that if Rule 17 is for the benefit of the defendant and is directed at "the attorney for the government," as the defendants here contend, that the rule makers would not have expressly so stated as was done in Rule 16? It borders on the absurd to argue for a construction of Rule 17(c) which would confer on a defendant an unlimited right of production by the government when such right has been definitely limited in Rule 16 by exact and specific language.

That the word "person" when used in a statute does not include the sovereign unless it is clear from the context, legislative history and background of the statute that such effect was intended, has been held by the Supreme Court. *United States* v. *Cooper Corporation*, 312 U. S. 600; *United States* v. *United Mine Workers of America*, 330 U. S. 258. In so holding, the court in the *Cooper* case stated (page 604): "Since, in common usage, the term 'person' does not include the sovereign statutes employing the phrase are ordinarily construed to exclude it," and the court further stated (page 606): "Without going beyond the words of the section, the use of the phrase 'any person' is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name * * *." In the *United Mine Workers of America* case, the court stated (page 275): "The Act [Norris-LaGuardia] does not define 'persons.' In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provisions, R. S. § 1, 1 U. S. C. § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself [Norris-LaGuardia] for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them."

Defendants' construction of Rule 17 not only brings it in irreconcilable conflict with Rule 16 but strips the latter of all meaning. If such construction be accepted, I perceive no reason why a defendant would ever proceed under Rule 16. Why bother to go into court and

obtain an order directing the government to make the limited production required under Rule 16 when much more could be obtained merely by filling in the blank space of a subpoena as provided for in Rule 17?

Defendants argue that "the authority granted by the terms of Rule 17(c) is discretionary." This is not correct as to the issuance of the subpoena which, as I have already shown, issues without motion and without order of court. The court has nothing to do with the subpoena until it has been issued and served. It is only subsequently thereto that the court is given any discretion, and the only novel feature contained in the provision, which I am able to detect, is the discretion lodged in the court to direct that the documents called for in the subpoena be produced before the court, prior to trial or prior to the time they are to be offered in evidence, and the discretion to permit the documents produced "to be inspected by the parties and their attorneys." Defendants, grasping at straws, profess to discern something in these last quoted words which fortifies their theory, but to my mind such words, if they have any significance, point in the opposite direction. Again, these words show how carefully the words "parties and their attorneys" were distinguished from the word "person."

Thus, as I read Rules 16 and 17, there is no conflict. Each is designed to serve a separate and distinct purpose. Rule 16 confers a limited privilege upon a defendant and to a like extent imposes an obligation upon "the attorney for the government." Rule 17 enables either party to obtain the attendance of a witness for the purpose of giving testimony, which witness may "also" be required to produce documents. In the latter event, the court may order such documents produced prior to trial and may permit their inspection by "the parties and their attorneys."

It is, therefore, my conclusion that the word "person", as used in Rule 17, does not include and is not applicable to the parties or their attorneys and that it provides for no command which may properly be directed to them. So there may be no mistake, I desire to emphasize that what I have said relates solely to the rule in controversy and has no reference to other means which may be employed to obtain the production of documentary evidence.

LINDLEY, *C. J.* dissenting:

I am sorry that I can not agree with the majority. It seems to be that my brethren read Rule 17(c) out of the books,—completely delete it. Rule 16 provides for the production of certain documents. Rule 17(c) authorizes a subpoena duces tecum,—an age-old expedient for securing the production of documents at the trial. However, it adds an innovation, in that the documents subpoenaed may be ordered produced prior to trial, for inspection. If we ignore this plain provision, then defendants may have only the documents mentioned in Rule 16; they may not have access to the additional documents authorized by 17(c); they are thereby completely prevented from employing the means provided by 17(c). Such a conclusion, it seems to me, does violence to the plain language of the rule.

That the documents subpoenaed were in the possession of the person to whom the subpoena was addressed is, as pointed out by Judge Duffy, admitted. Whether they were material or relevant was a question for the court. Why should the fact that the person who has the documents happens to be an attorney destroy the rule? I know of no principle of law that exempts from service and enforcement of a subpoena or from giving testimony one who has documents merely because he is an attorney in the case, whether for the complaining party or the defending party. Could the defendants successfully object to a similar subpoena served upon one of their counsel, commanding him to produce documents in his possession for inspection, as the rule provides, simply because it is addressed to one who is counsel in the case? I think not.

I agree with Judge Major that there is no conflict between the two rules and that each is "designed to serve a separate and distinct purpose." But I must part company with him when he concludes that we must absolve the government from compliance with a rule general in terms and applicable to any person merely because the person named in the subpoena happens to be a lawyer for the government.

I recognize that the extent of the relief to be granted under Rule 17(c) lies wholly within the discretion of the trial court, and were it appellant's contention that the District Court abused its discretion, we might have something to talk about. But no such question has been raised either in the trial court or here.

And on the same day, to-wit, on the seventh day of November, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, November 7, 1950.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

The United States of America, *Plaintiff*, vs. Bowman Dairy Company, *et al.* *Defendants*, and Willis L. Hotchkiss, *Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

10080

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed.

And afterward, to-wit, on the fourteenth day of November, 1950, there was filed in the office of the Clerk of this Court a designation of record which said designation is in the words and figures following, to-wit:—

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10080.

United States of America, *Plaintiff,* *vs.* Bowman Dairy Company, *et al.*, *Defendants,* and Willis L. Hotchkiss, *Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Trial Judge.

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED.

Bowman Dairy Company, et al., defendants-appellees in this cause, designate the following portions of the record in this Court to be printed:

1. The Order of this Court taking the cause under advisement.
2. The Opinion of this Court.
3. The Judgment of this Court.
4. The Order of this Court staying the issuance of its mandate.
5. This Designation.

L. Edward Hart, Jr.,
Leo F. Tierney,
Charles L. Stewart, Jr.,
Charles F. Simon,
Attorneys for Bowman Dairy Company, Walter F. Kettell, Francis H. Kullman, Jr., and D. Cameron Peck.

Howard Neitzert,
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Attorneys for The Borden Company, O. O. Smaha, O. N. Koenig and H. H. Inglehart.

Herman A. Fischer,
Carlton L. Fischer,
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Isidore Fried,
Herbert B. Fried,
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Leo F. Tierney,
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Thomas B. Gilmore,
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Charles W. Schaub,
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Of Counsel:
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Montgomery, Hart, Pritchard & Herriott,
Schumacher, Gilmore & Van Ness,
Sidley, Austin, Burgess & Smith.

Received a copy of the foregoing Designation this 14th day of November, A. D. 1950.

Willis L. Hotchkiss,
Chief of the Midwest Office and Trial Attorney, Antitrust Division, Department of Justice (Appellant).

Endorsed: Filed November 14, 1950. Kenneth J. Carrick, Clerk.

And afterward, to-wit, on the sixteenth day of November, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, November 16, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge.

The United States of America, *Plaintiff,* 10080 *vs.* Bowman Dairy Company, *et al.*, *Defendants,* and Willis L. Hotchkiss, *Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On motion of counsel for the defendants-appellees, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to Rule 25 of the Rules of this Court.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the designation of record filed on November 14, 1950, in:

Cause No. 10080.

The United States of America,

Plaintiff,

vs.

Bowman Dairy Company, *et al.*,

Defendants,

and

Willis L. Hotchkiss,

Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of November, A. D. 1950.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*